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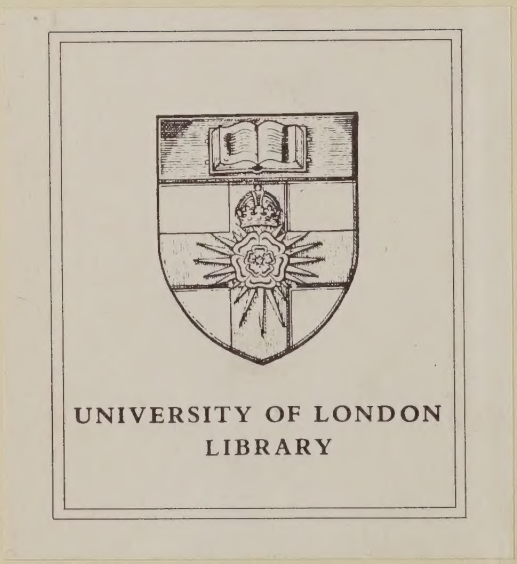

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MEMORANDUM.

DURING the Long Vacation the Right Hon. Mr. JUSTICE MURPHY died. At the commencement of the Michaelmas Sittings GEORGE WRIGHT, Esq., K.C., His Majesty's Solicitor-General, was appointed a Justice of the King's Bench Division of the High Court of Justice in Ireland, and JAMES H. CAMPBELL, Esq., K.C., was appointed Solicitor-General.

CORRIGENDA.

VOL. II.

Page 106, line 11, *for* "a motion" *read* "amotion."

,, 590, line 12 from foot, *Fetherstonhaugh, K.C.*, and *Denning* were counsel for the defendant company, and not *R. C. K. Wilson.*

,, 628, headnote, line 3, *after* "40 & 41" *read* "Vict."

CASES

DETERMINED BY

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1901.

Appeal.
1900.
April 30.

IN THE MATTER OF AN APPLICATION FOR COMPENSATION FOR MALICIOUS INJURIES: MAIRS, APPLICANT; COUNTY COUNCIL OF THE COUNTY BOROUGH OF BELFAST, RESPONDENTS (1).

Local Government — Compensation for malicious injuries — Jurisdiction of Recorder of Belfast — Damage not amounting to £5 — Belfast Borough Act, 1868 (28 & 29 *Vict. c.* clxxxiii. *s.* 18) — *Local Government (Ireland) Act* (61 & 62 *Vict. c.* 37, *ss.* 5, 21) — *Repeal of Special by General Act.*

The Belfast Local Act, 1865 (sect. 34) enacted that the provisions of the Grand Jury Act, 1836, relating to malicious injuries (sects. 135–141) should not apply to that borough, and provided (sect. 35) that the Corporation should have jurisdiction to award compensation for the malicious injuries therein mentioned. The Belfast Local Act, 1868 (sect. 18), enlarged the class of cases in which the Corporation should have jurisdiction to grant compensation so as to include all cases in which any person should thereafter wantonly

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON and HOLMES, L.JJ.

Appeal. 1900.

MAIRS v. BELFAST CORPORATION

or maliciously destroy any dwelling-house, furniture, goods, &c., of any person within the borough :—

Held, that the jurisdiction to award compensation possessed by the Corporation under these enactments was not transferred to the Recorder of Belfast by the Local Government Act, 1898 (sects. 5 and 21), and that the Recorder's jurisdiction to award compensation for malicious injuries was confined to such injuries as came within the purview of section 5 of the Local Government Act.

CASE STATED by way of appeal at the Spring Assizes, 1900, for the county of the city of Belfast by the Right Hon. Mr. Justice Gibson.

1. This case came before me on appeal from an order of the Recorder of Belfast awarding compensation to the applicant for malicious injury to the amount of £3 8*s*.

From this order an appeal was taken by the County Council on the ground that there was no jurisdiction to award compensation.

2. It was admitted that the injury (which was committed in the city of Belfast) was malicious, but that no indictment could have been maintained under the Malicious Damage Act, 1861, having regard to the fact that the damage was under £5.

3. For the applicant it was contended that under the Belfast Acts, 1865 (sections 34 and 35), and 1868 (section 18), and by virtue of section 21, sub-section (*e*) of the Local Government (Ireland) Act, 1898, the Recorder had jurisdiction to award compensation. For the County Council it was argued that there was no jurisdiction to give compensation as there had been no indictable offence, and that in any case there was no jurisdiction in the Recorder.

4. As the question seemed of general importance I gave leave to appeal. At the close of the argument it seemed to me that the provisions of the Local Government Act were intended to be of universal application, and accordingly that the compensation could not be awarded. I accordingly so decided, without however having any strong opinion on the point. The view that the special legislation of the Belfast Acts is not displaced by the subsequent general legislation is no doubt possible, and my impression has fluctuated. In any event the council are to abide their own

costs of appeal. The question of law for the decision of the Court of Appeal is whether the Recorder had jurisdiction. If he had, the order below is to be affirmed; otherwise, it is to be reversed.—J. G. GIBSON."

M'Gonigal and *Gordon, Q.C.*, for the applicant.

Thomas Harrison and *Campbell, Q.C.*, for the respondents.

[They cited *King* v. *Poor Law Commissioners* (1); *Bramston* v. *Colchester Corporation* (2).]

LORD ASHBOURNE, C.:—

This appeal comes before us on a special case stated by Mr. Justice Gibson at the assizes, on the hearing of an appeal from the Recorder of Belfast, raising the question whether the Recorder had jurisdiction to award to the applicant compensation for the malicious breaking of her windows, the damage being to an amount not exceeding five pounds.

There is no doubt that in Belfast, under the Belfast Borough Act, 1868 (28 & 29 Vict. c. clxxxiii) section 18, the Corporation had jurisdiction to award compensation to the applicant for the injury done; and the applicant contends that this jurisdiction has been transferred to the Recorder by section 5 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37). The first sub-section of that section made two changes in the law. First, it transferred to the County Courts (including the Recorder) the jurisdiction previously exercised by any presentment sessions or Grand Jury to grant compensation for criminal injuries under the Grand Jury Acts; and, secondly, it extended that jurisdiction so as to include certain classes of malicious acts for which Grand Juries had not previously power to grant compensation. The 9th sub-section is also of importance, because it extended to the whole of Ireland the provisions of the Grand Jury Acts relating to compensation for malicious injuries so far as they did not already so extend.

(1) 6 A. & E. 34. (2) 6 El. & Bl. 246.

Appeal. 1900.

MAIRS v. BELFAST CORPORATION

Lord Ashbourne, C.

Under the Grand Jury Acts no Grand Jury would have had power to grant compensation to the applicant, because the injury done did not fall within any of the classes of malicious damage for which the Grand Jury Acts authorised compensation to be awarded. Therefore under the first portion of the first sub-section of section 5 of the Local Government Act, which merely transferred to the County Court the business of the Grand Jury, the Recorder obtained no jurisdiction in the present case. Does the injury for which the applicant seeks compensation come within the extension of jurisdiction made by the latter portion of the sub-section? The proviso that the extension is not to apply "to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act 1861," compels us to answer this question in the negative. For, the injury here complained of can only come within the class dealt with in section 51 of the Malicious Damage Act, and not being to an amount exceeding £5, is therefore excluded from the class of cases in which a jurisdiction not previously given to Grand Juries is now given to County Courts to award compensation.

On the other point discussed, namely, whether the Mayor and Corporation of Belfast may not still retain their old jurisdiction in cases like the present, it is not necessary in this case, to express any opinion.

FITZ GIBBON, L.J. :—

Two questions are asked by this case :—First, had the Recorder jurisdiction to award compensation to the applicant? Secondly, how are the costs to be borne? We answer the first question in the negative : and in reply to the second question, we direct that each party shall abide his own costs. The Local Government (Ireland) Act, 1898, sect. 5, sub-sect. (1), transfers to the County Court (including the Recorder of Belfast) the business of any presentment sessions and Grand Jury in relation to compensation for criminal injuries, which it defines to be compensation under the Grand Jury Acts specified in the first schedule to the Act, part 1. So far, the County Court could have no jurisdiction to award compensation for the injury here claimed for, which was,

admittedly, not within any of the Grand Jury Acts. But having transferred this business to the County Court, the Act proceeds to enlarge the jurisdiction, so as to include cases which were not within the jurisdiction of the Grand Jury. It says: "Section one hundred and thirty-five and the following sections of the Grand Juries Act, 1836, ... shall extend to the case of . . . injuring property of any description . . . in like manner as they apply to . . . injuring . . . the particular descriptions of property specified in the first-mentioned section." These words would have included the present case, but the proviso follows "that this Act shall not extend the application of the said sections to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861." It has been admitted in argument that, the injury here done not being to an amount exceeding £5, the act was not a crime punishable on indictment under the Malicious Damage Act, 1861, and therefore the case is not within the extension of jurisdiction effected by the Local Government (Ireland) Act, 1898, section 5.

Sub-sect. 9 of the same section indicates that the Legislature intended that all County Courts and Recorders should have the same jurisdiction in such matters. If there be any jurisdiction now to give compensation under the Belfast Acts in cases not within the Grand Jury Acts as extended, that jurisdiction is not transferred to the Recorder, and this is the only question which we can decide upon this case.

There may be a question whether the jurisdiction of the Town Council under the Local Acts still survives, or whether the Local Government Act has created an uniform code of compensation for all Ireland, but as to this we say nothing. We decide only that the Local Government Act has not conferred jurisdiction on the County Court, or on the Recorder, in a case which is not within the Grand Jury Acts as extended by the Local Government Act.

HOLMES, L.J.:—

Previous to the passing of the Local Government Act, the right to compensation for malicious injuries in the borough of Belfast was governed by the local statutes, and differed from that

Appeal. 1900. MAIRS v. BELFAST CORPORATION Holmes, L.J.

which existed in the rest of Ireland. The malicious injury in this case might have been a subject for compensation by the Town Council in Belfast under its peculiar code, but could not have been so elsewhere. This is admitted; and it has been argued on behalf of the Corporation that by making the general statutes dealing with compensation for malicious injuries applicable to Belfast, which is undoubtedly the effect of section 5, sub-section 9, there has been an implied repeal of the provisions of the local statutes on this subject. It is unnecessary to decide on the present appeal this point which is of general importance, and cannot fail to arise hereafter in many aspects. It is quite clear that if the old Belfast provisions remain in force either in whole or in part, they must be administered by the old tribunal and not by the Recorder.

The jurisdiction transferred to the County Court by section 5, sub-section (1) is confined to business in relation to compensation under the scheduled Acts as extended by such section, and does not include compensation that could only be awarded under different statutes. If therefore the right to compensation continues to exist in a case like the present, it must be given by the Town Council and not by the Recorder. The argument that the Belfast Local Acts apply or amend any of the scheduled Acts or otherwise touch compensation thereunder, and that therefore they are included in the note to the schedule, is refuted by the facts. The Belfast Acts repeal the general Acts so far as regards that borough, and enact a different set of provisions. This is neither an amendment nor application of what is repealed. To prevent any misunderstanding, it is not to be supposed that my declining to decide at present the first question argued on behalf of the Corporation is an encouragement of the idea that Belfast has now a different law of compensation for malicious injuries from the rest of Ireland.

Solicitor for the applicant: *M'Gonigal.*
Solicitor for the respondent: *Sir Samuel Black.*

G. Y. D.

DONNELLY *v.* COYNE (1).

Appeal.
1900.
June 6.

Practice—Costs—Detinue—Return of property after service of writ, and before statement of claim—Offer by defendant to pay all costs properly and necessarily incurred up to date of return of property—Subsequent costs—R. S. C. Ir. (1893), *Order LXV., Rule* 4.

In an action for the return of two receipts or their value, and for damages for their detention, the defendant returned the documents after the service of the writ, and before the delivery of the statement of claim, and offered to pay to the plaintiff the costs properly and necessarily incurred up to the date of the return of the documents. The plaintiff furnished his costs, and the defendant objected to the amount, inasmuch as the bill included the costs of a statement of claim not then delivered. The plaintiff subsequently delivered a statement of claim claiming damages for the detention, and the defendant delivered a defence, lodging £1 in Court in satisfaction of the plaintiff's claim, which the plaintiff accepted in satisfaction of the damages for detention. The parties resided within the same civil bill jurisdiction :—

Held (reversing the decision of Boyd, J., sitting to hear applications for the Queen's Bench Division), that the plaintiff was not entitled to any costs incurred after the return of the documents.

Bradley v. *Archibald* ([1899] 2 I. R. 108) distinguished.

MOTION on behalf of defendant to review taxation. The action was brought for the return of two receipts or their value, and damages for their detention. The writ was issued on the 17th October, 1899, and the defendant returned the two receipts on the 25th October, 1899. On the 3rd November the defendant's solicitor offered to the plaintiff's solicitor to pay all costs properly and necessarily incurred down to the date of the return of the documents, but they differed as to the amount, the plaintiff claiming the costs of a statement of claim not then delivered. On the 3rd November the defendant entered an appearance requiring a statement of claim, and on the 20th November the plaintiff

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900.

DONNELLY v. COYNE.

delivered a statement of claim, claiming £10 damages for detention of the goods. On the 28th November the defendant delivered a defence, paying £1 into Court, which the plaintiff drew out in full satisfaction of all damages. The plaintiff and defendant both resided within the same civil bill jurisdiction. The plaintiff then proceeded to tax his costs, and in doing so he claimed to be entitled to the entire costs of the action. To this the defendant objected, and contended that the plaintiff was not entitled to any costs after the date of the return of the documents. The Taxing Master overruled the objection, stating as his reason that the case was governed by the decision in *Bradley* v. *Archibald* (1).

Christie, for the appellant:—

After the defendant returned the goods the nature of the action changed, and it became a mere personal action for damages. The statement of claim determines the nature of the action, and the plaintiff is bound by his claim as set forth in it: *Cargill* v. *Bower* (2).

The case of *Bradley* v. *Archibald* (1) is distinguishable, as in that case the documents, the subject of the detention, were handed over by the defendant to the plaintiff at the trial, in open Court, and after the issues had been submitted to the jury, and the jury had answered the questions submitted to them in favour of the plaintiff. On these facts Palles, C. B., held that what had taken place amounted to a judgment for the plaintiff. In the present case, even if the return of the documents amounted to a judgment, and that judgment carries costs, it must be taken as a judgment as of the date of the return, and cannot carry subsequent costs.

Detinue is an action founded on tort: *Bryant* v. *Herbert* (3); and where a sum not exceeding £5 is recovered, and where the parties reside within the same Civil Bill jurisdiction, the plaintiff is not entitled to any costs, Order LXV., R. 4: *Byrne* v. *M'Evoy* (4); *Birmingham* v. *Billing* (5). The plaintiff has accepted

(1) [1899] 2 I. R. 108.
(2) 10 Ch. D. 502.
(3) 3 C. P. D. 389.
(4) I. R. 5 C. L. 568.
(5) I. R. 9 C. L. 287.

£1 as satisfaction for the damages, and is not entitled to any costs incurred after the return of the documents.

Calvert, for the respondent:—

An action for detinue, and a claim for damages for detention of the goods, are one class of action springing out of the same thing: *Blackmore* v. *Higgs* (1). Once an action of detinue always an action of detinue: *Bradley* v. *Archibald* (2). It is true that if the defendant returns the goods a defence pleaded to that effect is a good plea in bar: *Crossfield* v. *Such* (3); but the plaintiff is entitled to damages for detention: *Gallagher* v. *Nolan* (4); *Lyons* v. *Keller* (5). The appellant's contention amounts to this, that in detinue the plaintiff should demand a return of the goods by a writ in the Superior Courts, and he should proceed for the damages in the County Court.

LORD ASHBOURNE, C.:—

The Court has had no difficulty in arriving at a conclusion which will, I think, do justice in this case. This action was brought for the detention of two receipts, which were handed back shortly after the service of the writ, and a small sum was lodged in Court as sufficient for their detention. The material element arose when the action came—as most actions do—before the Taxing Officer. When the case came before Master Mathews he was disposed at first to give the plaintiff full costs in an action of detinue up to the restoration of the goods; after that he considered that it was an action for damages, to which the ordinary rule as to costs applied. But later on he was pressed by the argument that once an action of detinue always an action of detinue, and by *Bradley* v. *Archibald* (2), with the result that he changed his mind, and he gave the plaintiff all the costs, not only down to the return of the documents, but also the costs subsequently incurred. There was a motion to the

(1) 15 C. B. (N. S.) 793.
(2) [1899] 2 I. R. 108.
(3) 8 Ex. 159.
(4) 9 Ir. Jur. (N. S.) 382.
(5) 9 Ir. Jur. (N. S.) 381.

Appeal. 1900. DONNELLY v. COYNE. Lord Ashbourne, C.

Queen's Bench to review the ruling of the Taxing Officer, when Boyd, J., thinking that the case was governed by *Bradley* v. *Archibald* (1), refused to review the taxation, and from that order the defendant has appealed. The counsel for the appellant, Mr. Christie, has argued the appellant's case very well at very short notice.

In my opinion the appeal is well founded. Down to the date of the return of the documents the plaintiff should have his full costs; after that, the action became one of a different character, namely, an action for damages. I have read *Bradley* v. *Archibald* (1), and I can find nothing in it to support the contention of the plaintiff, or to lead me to the conclusion that the plaintiff is entitled to the costs subsequent to the return of the documents. I think that the Taxing Officer need not have changed his mind, and he ought to have adhered to his first opinion. In my judgment the decision of the Court below should be reversed, and the appeal should be allowed.

FITZ GIBBON, L. J.:—

It appears to me that the plaintiff is entitled to the costs of this action up to and including the return of the goods claimed, but that he is not entitled to any subsequent costs, because the action, thenceforward, was an action for damages only, and the amount recovered, £1, carries no costs, as the parties reside within the same civil bill jurisdiction. The defendant is entitled to the costs of the motion in the Court below, and of this appeal, such costs when taxed to be set off, so far as may be necessary, against the general costs to which he is liable.

If the goods are returned after a writ in detinue is served, the plaintiff ought to be treated as having recovered them in the action, and there is no statute limiting the costs up to the return. But there is now no necessity to have only one judgment, and it appears to me that a defendant, in an action for detinue and damages, might confess a judgment for the detinue, and lodge money and go to trial on the damages. An action cannot last longer than the cause of action. It is a good plea to an action of

(1) [1899] 2 I. R. 108.

detinue, that, after suit and before plea, the defendant returned the goods, and the plaintiff accepted them. Parke, B., so decided in *Crossfield* v. *Such* (1). If the plaintiff goes on with the action for damages only, he is therein entitled only to whatever costs the law gives him in such an action, on the result, and here that is nothing. I put the case, during the argument, of an action of detinue only, continued to the end, where judgment for the return of the goods could not be given, because they were proved to be lost; the judgment would be for their value as damages, but would not the statutes limiting costs by the amount recovered apply in that case? Here the action was settled before trial, the costs in detinue are payable down to the settlement of that cause of action, and the statute regulates the costs recoverable in respect of the damages.

WALKER, L. J.:—

I concur. I think that the case is ruled by *Crossfield* v. *Such* (1), which decided that it was a good plea in an action of detinue to plead a return of the goods and their acceptance, and as to the damages for their detention a payment into Court of 1*s.* averring no damages, *ultra*. In my opinion, *Bradley* v. *Archibald* (2) does not stand in the way. In that case the action went to trial, and at the trial the issues were sent to the jury, and there was a finding on them, and then a consent was entered into, and the goods were returned, and they were taken as returned as at that date. The Lord Chief Baron considered that the same as if a judgment of that date had been recovered. Here the facts are different, because the receipts were returned immediately after the issue of the writ.

HOLMES, L. J.:—

I have always thought that where in an action of detinue the chattel detained is handed over by the defendant, and accepted by the plaintiff without an order of the Court, and the only judgment is for damages for the detention, it was doubtful whether any costs could be recovered beyond the costs payable in an

(1) 8 Ex. 159. (2) [1899] 2 I. R. 108.

Appeal. 1900.

DONNELLY v. COYNE.

Holmes, L.J.

ordinary action of tort. On one or two occasions when during the course of a trial a settlement has been arrived at on the terms above mentioned, I have suggested that the defendant should consent to a judgment for all the costs of the action so as to avoid the difficulty.

Crossfield v. *Such* (1) is an authority that when the chattel detained was handed over between the writ and declaration, the action ceased to be one of detinue, and if continued was to be regarded as one for damages for the detention.

At the same time, I am willing to accept the decision in *Bradley* v. *Archibald* (2) which, as I understand it, is in accordance with legal principles and good sense. It rules that when the chattel is given and received by consent, it amounts to a recovery by judgment; but this ought to mean a judgment of the date of the consent. Therefore, in this case the plaintiff is entitled to his costs down to the time of the receipt of the documents, but is not entitled to costs subsequent thereto.

Solicitor for plaintiff: *James Duff.*

Solicitor for defendant: *William Gallagher.*

R. D. M.

(1) 8 Ex. 159. (2) [1899] 2 I. R. 108.

GRAHAM *v.* BELFAST AND NORTHERN COUNTIES RAILWAY COMPANY (1).

Q. B. Div. 1900.
May 9, 10. June 18.

Contract—Liability limited to wilful misconduct—Acts of omission—Knowledge —Onus *of proof.*

G., having contracted with the Railway Company that they were to be exonerated from liability in respect of the transit of his goods, save when the damage arose from their wilful misconduct, delivered at Ballymena railway station, for carriage to Manchester, a case of fowl, which the Railway Company knew to be perishable goods requiring to be forwarded without delay. They failed to despatch the goods by either of two trains, which would have ensured their arrival in time for the Manchester markets on the following morning, for which they were intended, and when the goods did arrive in Manchester they were late, and, being perishable, had deteriorated in value. At G.'s instance, the consignee refused to take delivery, and G. sued the Company for the loss occasioned by their wilful misconduct in delaying the goods :—

Held (Palles, C.B., *diss.*), that, under the circumstances, unreasonable delay, even though entirely unexplained, was not sufficient to amount to wilful misconduct, and that it lay upon the plaintiff to prove that the defendants intentionally delayed the goods.

Held, by Palles, C.B., that the defendants being aware, from the perishable nature of the goods, that substantial damage would result from delay, there was evidence that their omission to forward them at once was wilful, and therefore there was evidence of wilful misconduct.

CASE STATED for the opinion of the Queen's Bench Division of the High Court of Justice in Ireland by Mr. Justice Gibson at the Spring Assizes for the county of Antrim, 1900.

The case was as follows :—

1. This was an appeal from a decree for £4 10*s*. The plaintiff, a fowl dealer, consigned a case of fowl for carriage by defendants from Ballymena to Manchester. The defendants relied on a special contract, by the terms of which they were exonerated from liability, save in case of wilful misconduct. The contract, signed by the plaintiff, is to be taken as incorporated herewith (2). The

(1) Before PALLES, C.B., and JOHNSON and BOYD, JJ.

(2) See next page.

Q. B. Div. 1900.

GRAHAM v. BELFAST AND N. COUNTIES RAILWAY CO.

BELFAST AND NORTHERN COUNTIES RAILWAY COMPANY.

GENERAL MANAGER'S OFFICE,
September 12*th*, 1898.

GENERAL AGREEMENT FOR GOODS TO BE CARRIED AT REDUCED RATES AT OWNER'S RISK.

MR. THOS. GRAHAM,—I beg to inform you that the Belfast and Northern Counties Railway Company have two rates for the carriage of certain goods, at either of which rates the same may be consigned at the Sender's option:—

One, the Ordinary Rate, when the Company accept the ordinary liability of a Railway Company; the other, a Reduced Rate, adopted when the Sender agrees to relieve the Company and all other Companies or persons over whose lines the Goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention (including detention of Traders' Trucks), except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the Company's servants.

If you wish to have the advantage of the Reduced Rate it will be necessary for you to fill up and sign the form printed below, and then return it to the Company.

I am, yours faithfully,

E. J. COTTON, *General Manager*.

To THE BELFAST AND NORTHERN COUNTIES RAILWAY COMPANY.

In reference to the above, *I* request that all Goods for which there are alternative rates delivered by *me* or on *my* account at any of your stations, for carriage by railway, may be carried at the Reduced Rates (where and so long as such rates exist) except when specially consigned at the higher rate; and in consideration of your charging *me* such Reduced Rates, *I* agree to relieve you and all other Companies or persons over whose lines the Goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention (including detention of Traders' Trucks), except upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the Company's servants.

And *I* further agree that this Agreement shall apply to traffic consigned to *English* stations on other Companies' lines when the rate charged for the carriage of such traffic is a Reduced Alternative Rate.

I also agree to the conditions on the back hereof.

This Agreement shall continue in force from the present date until *I* signify in writing to the contrary. Provided nothing herein contained shall prevent *me* during its continuance from sending or receiving any particular consignment at the higher rate should *I* at any time so direct in writing.

(Signed), THOMAS [*ad. stamp.*] GRAHAM.

Witness to the Signature J. KIELTY, this 12*th* day of *September*, 1898.

question in the case was, whether there was evidence of wilful misconduct within the contract.

2. The contract was signed, and the case of poultry delivered to the defendants in the forenoon of the 21st July, in quite sufficient time for the mid-day train, by which the plaintiff (who had several similar previous transactions with defendants) intended and understood (as defendants knew) that the consignment should be sent so as to be in time for the next Saturday's market in Manchester. The defendants were aware that the goods were perishable, and ought to be forwarded without delay.

3. The case was not sent on by the mid-day train at 1.20 p.m., or by the next train at 5.25 p.m.; if sent by the latter, the poultry would have reached Manchester at eight o'clock, before the market had actually closed, but with risk of failure to sell or likelihood of getting a bad price, as well as the danger that the fowl might have become deteriorated.

4. The evidence of the defendants' servants was, that the case was delivered by the plaintiff to them, between three and four o'clock in the afternoon, in time for the next train; but, that owing to press of passenger traffic, it had been pushed aside, and had been overlooked. It was sent by the following train, at 7.55 p.m.

5. The plaintiff having learned what had happened, telegraphed to his consignee to refuse to accept delivery. The poultry was sold by the defendants at a reduced price to avoid total loss, and they offered the sum realised to the plaintiff, who declined to take it, on the ground that the poultry was bad and unsaleable.

6. I found, as a fact, that the plaintiff's evidence as to the time of delivery by him to the defendants was true, and that the evidence of the railway servants was false. I also found that the delay was unreasonable and entirely unexplained.

7. On behalf of the defendants, counsel contended that there was no evidence of wilful misconduct; plaintiff's counsel argued that there was such evidence, the facts being particularly within the knowledge of the defendants, and the only explanation of the delay that was suggested being shown to be false.

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8. On application of defendants' counsel, I consented to state a case, on the terms that defendants should pay the plaintiff all costs incident to the argument of such case in any event.

The question for the decision of the Court is—whether there was, on the above facts, any evidence of wilful misconduct on the part of the defendants? If there is such evidence, the decree is to be affirmed. If there is not, it is to be reversed.

Harrison, Q.C., and *Christie*, for the defendants.

Robert Todd, for the plaintiff.

The following cases were referred to in the arguments:—*Mahony* v. *Waterford, Limerick, and Western Railway Co.* (1); *Lewis* v. *The Great Western Railway Co.* (2); *Glenister* v. *The Great Western Railway Co.* (3); *Young and Harston's Contract* (4); *Hoare* v. *The Great Western Railway Co.* (5); *Stevens* v. *The Great Western Railway Co.* (6); *Curran* v. *The Midland Great Western Railway Co.* (7); *Smith* v. *The Midland Railway Co.* (8); *Haynes* v. *The Great Western Railway Co.* (9); *Woodgate* v. *The Great Western Railway Co.* (10); *Bolland* v. *The Waterford, Limerick, and Western Railway Co.* (11); *Williamson* v. *The Rover Cycle Co.* (12).

June 18.

BOYD, J.:—

On the facts stated in this case, I am of opinion that there was no evidence of wilful misconduct on the part of the defendants, and that the decree should be reversed.

There was a contract which the plaintiff might have entered into with the defendants at the ordinary rate, in which case the defendants would have been liable for unreasonable delay or

(1) [1900] 2. I. R. 273.
(2) 3 Q. B. D. 195.
(3) 29 L. T. (N. S.) 423; 22 W. R. 72.
(4) 31 Ch. D. 168.
(5) 25 W. R. 631.
(6) 52 L. T. (N. S.) 324.
(7) [1896] 2 I. R. 183.
(8) 57 L. T. (N. S.) 813.
(9) 41 L. T. (N. S.) 436.
(10) 51 L. T. (N. S.) 826; 1 L. T. R. 133; 33 W. R. 428.
(11) 31 Ir. L. T. R. 62.
(12) Not reported.

detention in the carriage of the plaintiff's goods, upon the mere proof that such delay or detention had occurred, and there was the contract, which in fact he did enter into, at a reduced rate, by which it was stipulated that the Company should not be liable for delay or detention of the goods except "upon proof" that such delay or detention arose from "wilful misconduct" on the part of the Company's servants.

It lay, I think, upon the plaintiff to prove the wilful misconduct of which he complained. The only evidence which he gave was that the goods might have been sent by two trains prior to the one by which they were forwarded. In other words, he gave merely such evidence as would have sufficed to establish a claim had the contract been one at the "ordinary rate." I think it lay upon him to prove not merely that the goods were negligently delayed or detained, but that they were intentionally delayed or detained. As Bramwell, L. J., puts it, in *Lewis* v. *The Great Western Railway Co.* (1), "Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*-conduct, not the conduct, must be wilful." The whole of the evidence given by the plaintiff does not even suggest any such misconduct; and having failed to "prove," as required by the contract, "wilful misconduct," I am of opinion his case should have been dismissed upon such failure. But even if the defendants should have been required to give the evidence which they did give, what does it amount to? Simply that owing to the traffic the goods were "pushed aside and had been overlooked." Supposing that every word of it was disbelieved, how did it afford any "proof" of "wilful misconduct"? I think that when a man having the option of an "ordinary rate" contract and a "reduced rate" contract deliberately selects the latter and takes its risks, the Court should not be astute to try and save him from himself, and to endeavour to get him out of the contract into which he so entered, and to impose upon the Company the liability of an "ordinary rate" contract.

(1) 3 Q. B. D. 195. at p. 206.

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GRAHAM v. BELFAST AND N. COUNTIES RAILWAY CO.

JOHNSON, J.:—

On 21st July last the plaintiff, a fowl dealer, took a case of fowl to the Ballymena Station of the defendant Railway Company, to be by the defendant Company carried to Manchester, and there delivered to his consignee. He was offered his choice of either of two contracts: 1, on payment of the ordinary rate of carriage the ordinary liability of the Railway Company; or, 2, on payment of a lesser rate of carriage only the liability of the Railway Company, defined and limited by the terms of a special condition. He had previously had several similar transactions with the defendant Company, and with this experience he elected to pay the cheaper rate, attended as it was with the disadvantages arising from such a stringent special condition, and accordingly he signed the contract for that purpose. The validity of this special condition is not now disputed, and by it in consideration of the cheaper rate of carriage the plaintiff agreed to absolve the defendant Company from "all liability for loss, damage, misdelivery, delay, or detention (including detention of trader's trucks), except upon proof," that it "arose from wilful misconduct on the part of the Company's servants." The plaintiff's evidence (which was believed by the learned Judge) was that the plaintiff delivered his case of fowl to the servants of the defendant Company at their Ballymena Station at a sufficiently early hour on the 21st July to have it sent on either by the 1.20 p.m. train or the 5.29 p.m. train on that day, "as he intended and understood (as defendants knew) so as to be in time for the next Saturday's markets in Manchester." The evidence of the defendants' servants (which was not believed by the learned Judge) was that the case of fowl was delivered to them between 3 and 4 p.m. in time for the 5.29 p.m. train on the 21st July, but owing to pressure of passenger traffic was pushed aside and overlooked. The case finds that the defendants were aware the goods were perishable and ought to be forwarded without delay. The case of fowl was in fact sent on by the 7.55 p.m. train on the 21st July, but did not reach Manchester in time for the Saturday market, and was refused by the consignee and sold to the plaintiff's loss. The learned Judge finds that "the delay was unreasonable and entirely unexplained," but does not find that the delay arose from, or that it was proved that it

arose from, wilful misconduct on the part of the servants of the defendant Company; and the question left to the Court is, whether there was any evidence of wilful misconduct on the part of the defendants? Wilful misconduct is not a term of art: it is an ordinary expression in common use signifying (I apprehend) intentional wrong conduct in the existing circumstances. The result of the judgments in the Court of Appeal in England in *Lewis* v. *Great Western Railway Company* (1) and of the Divisional Court in *Glenister* v. *Great Western Railway Company* (2), is, I think, that wilful misconduct in such a special condition means misconduct to which the will is party as contra-distinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail, or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do, it, or persists in the act, failure, or omission, regardless of consequences. "Unreasonable delay entirely unexplained" is as consistent with negligence, even gross or culpable negligence (which is not wilful misconduct) or with forgetfulness or accident as it is with "wilful misconduct." But it is not sufficient, I think, that the facts proved from which the injury arose are consistent with "wilful misconduct"; they ought to be inconsistent with the absence of "wilful misconduct" and to be such as that a jury might reasonably infer from them that the injury arose from "wilful misconduct," and not from any other cause: *Haynes* v. *Great Western Railway Company* (3). The learned Judge having disbelieved the evidence of the servants of the defendant Company that evidence is out of the case, and the plaintiff had to prove that the delay of which he complained arose from wilful misconduct on the part of the servants of the defendant Company. In Buller's N. P. 198 it is stated, "In every issue the affirmative is to be proved, and therefore it is sufficient to deny what is affirmed until it is proved, but when the affirmative is proved the other side may contest it with opposite proof, for this is not properly

(1) 3 Q. B. D. 195. See Bramwell, L.J., 206; Brett, L.J., 210, 211; Cotton, L.J., 213.

(2) 29 L.T. (N.S.) 423; 22 W.R. 72.

(3) 41 L. T. (N.S.) 436.

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Johnson, J.

the proof of a negative, but the proof of some proposition inconsistent with what is affirmed." The decision in *Wakelin* v. *London and South Western Railway Company* (1) appears to me to be founded on this principle. The plaintiff's evidence that the servants of the defendant Company had his case of fowl in their possession in sufficient time to have sent it on in ordinary course in time for the Manchester Saturday market (which was what they knew he intended and understood when he gave the fowl into their possession to carry), and yet that the fowl were delayed and did not reach Manchester in time for the market, even though the learned Judge finds that the delay was unreasonable and entirely unexplained, is not, I think, evidence that, or which proves that, the delay arose from wilful misconduct, or which calls on the defendant Company for explanation that the delay did not arise from wilful misconduct of their servants. In *Woodgate* v. *Great Western Railway Company* (2) (an appeal from a County Court Judge) the condition freed the defendant Company from delay to a passenger "unless upon proof that it arose from the wilful misconduct of the Company's servants": the plaintiff, a barrister, was passenger in defendants' train which was delayed and consequently missed its connexion with another train and the plaintiff was thereby delayed; he might have been sent on by a special train, but as the line was a single one this would have caused confusion, and was contrary to the rules of the Company. The County Court Judge did not find wilful misconduct as a fact; but he held that the defendant Company was bound to excuse the delay, and that, in the absence of proof that it arose from inevitable accident, there was evidence that it arose from wilful misconduct of the Company's servants. The Divisional Court held that it was impossible to follow the reasoning of the County Court Judge, and set aside his judgment for the plaintiff. In *Webb* v. *Great Western Railway Company* (3) the plaintiff had been in the habit of sending large furniture vans by the defendant Company's railway under a special condition similar to that in the present case. Delay frequently occurred, of which the plaintiff complained, and was

(1) 12 App. Cas. 41.

(2) 1 T. L. R. 133, where the condition is set out; 33 W. R. 428; 51 L. T. (N. S.) 826.

(3) 26 W. R. 111.

told that proper trucks would be ready for him if he gave previous notice; he gave due notice accordingly, and delivered his furniture van to the defendant Company to be carried by them partly on their own line and partly over and delivered at a station on the line of the London and North Western Railway Company. The servants of the defendant Company loaded the van on a truck so that it would clear the bridges over the line of the defendant Company, but did not know, and though the load was to go through to its ultimate destination, failed to ascertain or even make inquiry whether it would clear the bridges of the London and North Western Railway in order to reach its destination without delay. The load was too high in fact for the London and North Western Railway bridges, and its delivery was consequently delayed until the load was sufficiently reduced in height to pass under the London and North Western Railway bridges. It was held that this evidence that the defendants' servants packed the load, failing or omitting to ascertain or inform themselves or even to inquire whether so packed it could pass under the London and North-Western Railway bridges and reach its ultimate destination without delay was not, (though it was consequently in fact delayed) such evidence of wilful misconduct on the part of the servants of the defendant Company as it lay on the plaintiff to prove. No hard-and-fast rule can be laid down for every case, but I think it is sufficiently clear on these authorities that the plaintiff who elects to send his goods under such a condition as that in the present case must, in order to succeed, give some affirmative evidence of wilful misconduct, and if he fails to do so he is not entitled to recover: it is not every unreasonable act or omission, though entirely unexplained, which is such wilful misconduct. Then, it is contended that if this is so, it is difficult, or in some cases hardly possible, for a plaintiff bound by such a condition to give evidence of such facts or circumstances as will enable him to recover for loss by delay; but, assuming the validity of the condition, the plaintiff knew, or must be taken to have known, that he would have to face the consequences when for the sake of a saving of carriage he elected to enter into this contract. *Mahony's Case* (1)

(1) [1900] 2 I. R. 273.

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does not apply, because there wilful misconduct was found as a fact, and in that state of things it was for the defendant Company to discharge or excuse themselves from liability. For these reasons, I think the question should be answered in the negative; but it must be distinctly understood that the validity of this condition has not been disputed in this Court.

PALLES, C. B.:—

The question reserved for us is whether there was, on the facts stated in the case, any evidence of wilful misconduct on the part of the defendants.

A parcel of poultry was delivered to the defendants at their Ballymena station in the forenoon of the 21st July, and was then booked with them for Manchester. The case states as a fact that it was so delivered in sufficient time for the mid-day train; that the defendants knew that the plaintiff, who had had several similar transactions with the defendants, intended that the consignment should be sent on so as to be in time for the next Saturday's market in Manchester, and that the defendants were also aware that the goods were perishable, and ought to be forwarded without delay. The parcel was not sent on by the mid-day train, which left at 1.20 p.m., nor by the next train, which left at 5.29 p.m. From these facts the learned Judge has found, as in my mind he was clearly entitled to find, that there was unreasonable delay.

I agree with my brothers that there must be *some* evidence of wilful misconduct. Now was there any such evidence? It is clear that "wilful misconduct," within the meaning of the condition relied on, may consist in an act of omission, as distinguished from one of commission. No authority is requisite for this; but it is not only recognised, but expressly laid down by Lord Esher in the case relied upon by the defendants: *Lewis* v. *Great Western Railway Company* (1). There he says:—"In a contract where the term 'wilful misconduct' is put as something different from, and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do some-

(1) 3 Q. B. D. at p. 210.

thing, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or which he is omitting to do, is a wrong thing to do or to omit."

This being so, the question here is reduced to this: was there evidence that this misconduct was wilful? As to the knowledge necessary to give the misconduct this character, Lord Esher, in the same judgment says:—"It involves the knowledge of the person that the thing which he is doing is wrong. I think that, if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do."

I am not quite certain what exactly Lord Esher meant by the use of the word "wrong," and by his qualification of "damage" by "seriously." For myself, I should have thought that any *intentional* breach of contract would have been wilful misconduct. It is not necessary, however, to discuss that question here, nor do I desire to do so. For the purpose of the present case, I am willing to act upon the definition as it stands. It admits that an act of omission may amount to misconduct; and there is evidence here that the omission to forward within a reasonable time did cause damage, and, if it is necessary to go into the character of the damage, "serious" damage—whatever may be the meaning of that expression.

The case in which that judgment was delivered, *Lewis* v. *Great Western Railway Company* (1), is much relied on for the defendants. The question there was in relation to the mode in which certain Cheshire cheeses had been packed by the defendants at their Paddington station. Cheeses of this character were not usually sent from that station. They were of varying sizes, and many of them were unusually large. They were packed at Paddington in a wagon, in the usual mode of packing the cheeses sent from there, viz. on their edges, in two tiers, one above the other. Although smaller kinds of cheeses, of uniform size, and from other parts of England, might be, and usually were, so packed on their edges, and in tiers, yet the greater weight, thickness, and

(1) 3 Q. B D. 195.

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Palles, C.B.

varying sizes of Cheshire cheeses render a different mode of packing necessary; and the proper mode of packing the cheeses in question would have been to place them in the wagon flat, and in a single tier only. This was the mode in which such cheeses were usually packed by the defendants in Shropshire and Cheshire. The *ratio decidendi* of the judgment there, which was for the defendants, is thus stated by Lord Bramwell, L.J.:—"I think there is abundant evidence that if these cheeses had been packed at some place in Cheshire or Shropshire, where they are commonly packed in order to go to London, they would have been packed differently; and that the right conclusion for the learned Judge to have drawn from the evidence would have been that men who were in the habit of packing them, and usually packing in a different manner, must have known that by packing them in this way they were packing them in an unusual, and therefore, presumably, wrong way. But I cannot think that there was evidence in this case to show, or on which the learned Judge could properly find, that the men who packed these cheeses, . . . who were in London, a place from which much Cheshire cheese is probably not exported, *knew* that they were doing wrong, or at all events that they were aware that mischief might result, and that they improperly failed to inform themselves as to whether mischief would or would not result from it."

The act there, the knowledge of the injurious character of which the Court declined to impute to the defendants, was the adoption of the usual mode of packing, a mode which was improper, *solely* by reason of the special character of the particular cheeses in question, a special character which, although generally known in Shropshire and Cheshire, appeared to be unknown in London. The essential distinction between that case and the present is that here there is nothing unusual, nothing special, nothing unknown to the defendants. They are found to have known that the fowl were intended for the next Saturday's market, and that they were perishable. This was evidence that they knew that substantial damage would probably result from such delay as actually occurred. There is, therefore, 1, evidence of misconduct by the defendants; 2, evidence that, at the time of such their misconduct, they knew that it would cause damage; that is, we

have present here the element, on the absence of which the decision in *Lewis's Case* (1) depended; and I am unable to see why these two facts, in themselves, did not amount to evidence of wilful misconduct. It can hardly be denied that there would have been such evidence, if the servant, whose duty it was to put the parcel into the goods-wagon of the train, was the same person as received and booked them; and upon the question of the existence of evidence, as distinguished from the weight that is to be attributed to it, I cannot see that it makes any difference whether the defendants employed at Ballymena one person only, or several persons, to discharge such of their duties incident to their contract to carry, as were to be discharged at that station. Nor does it appear that they were different persons. But if we are to enter into the question arising from the possible, but unproved, employment of a multiplicity of servants there, then it will hardly be deemed that the omission of the defendants' clerk, who ought to have, but did not, put the goods into the wagon, was caused either, 1, by the omission of his fellow-clerk to afford him some information, which in the ordinary course of business he ought to have afforded him, or, 2, by his own forgetfulness; and, I think, that in either of these alternatives, there would be evidence of wilful misconduct. As to the first, there is a presumption of fact that the clerk who booked the parcel acted in the ordinary course of his duty, and, therefore, that he communicated the fact of its receipt and its destination to the servant whose duty it was to load the train. As to the second, the fact that this latter servant, at one time, knew, from the information of the booking-clerk, of the booking of the goods, and that they ought to be sent forward, is evidence that he continued to have this knowledge at or about the time when the train was about to start, and when the omission to put the parcel into the goods van occurred; if so there is evidence that the omission was wilful, and, therefore, evidence of wilful misconduct. The real defence relied on was the alleged forgetfulness of the clerk, the defendants' servant. Such a defence involves an inquiry into the state of mind of that servant, and I cannot doubt that the *onus* of proving this, lies on

(1) 3 Q. B. D. 195.

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the defendants. I do not think it necessary to refer, in detail, to the many cases cited. Each case was decided on its own peculiar circumstances, and none is, to my mind, inconsistent with the view which I have taken. In nearly all of them the facts were proved by the defendants. Here the question is the *onus* of proof, not whether the admitted circumstances amount to wilful misconduct. I take, as an example, *Webb* v. *Great Western Railway Co.* (1). It was *proved* that the defendants' servants *did not know* the height of the bridges of The London and North-Western Co. The defendants servants there were, therefore, negligent, but not knowingly or willingly negligent.

In reference to the approval which I expressed in *Mahony* v. *Waterford and Limerick and Western Railway Co.* (2), of the proposition laid down in Taylor on Evidence, § 376 (A), that "where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour," I desire to say a word. I have, since that judgment, considered all the cases which are referred to, and many others; and the result of my consideration is that I wish to withdraw that approval, and to hold myself free to determine, whenever that question shall arise, whether that proposition can be maintained in the broad generality in which it is there expressed, and, if not, to what limited class of cases it should be applied. There is, no doubt, substantial authority to support it. It is the *ratio decidendi* of Ashurst, J., in *Dickson* v. *Evans* (3); and it is specifically laid down, as a *general rule*, by both Bayley, J., and Holroyd, J., in *The King* v. *Turner* (4). There are also American decisions to the same effect, which are referred to in the last edition of Mr. Best's book on the Principles of Evidence, 8th ed., p. 269, n. 1. On the other hand, a close consideration of the English authorities will show that they are not uniform; and the decisions in *Dickson* v. *Evans* (3) and *Rex* v. *Turner* (4) can be supported on other grounds. In *Dickson* v. *Evans* (3), the defendant relied upon a set-off; consequently he

(1) 26 W. R. 111.
(2) [1900] 2 I. R. 273.
(3) 6 T. R. 57.
(4) 5 M. & S. 206, at pp. 211, 212.

was in the position of a plaintiff, and the *onus* lay upon him of proving a set-off of a class available in such an action as he was defending, *i. e.* one at the suit of the assignees of a bankrupt. He, therefore, had to prove a set-off, which accrued before the bankruptcy. *Rex* v. *Turner* (1) was a prosecution under the Game Laws, and in such cases the rule appears to have been uniformly applied; but in many of those cases it is attributed to the special words of the particular Acts of Parliament. Further in *The King* v. *Burdett* (2), Holroyd, J., whilst stating that "It is established, as a general rule of evidence, that, in every case, the *onus probandi* lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognisant," adds this, "This, no doubt, is not allowed to supply the want of necessary proof, whether direct or presumptive, against the defendant of the crime with which he is charged; but *when such proof has been given*, it is a rule to be applied in considering the *weight of evidence* against him, whether direct or presumptive, when it is unopposed and unrebutted, or not weakened by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively were not true." In *Elkin* v. *Janson* (3) when the expressions of Bayley, J., in *Rex* v. *Turner* (1) were cited, Alderson, B., said, "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the weight of the evidence, but there should be some evidence to start it, in order to cast the *onus* on the other side." Mr. Justice Stephen in his Digest of the Law of Evidence, Pt. 3, ch. 13, p. 100, states the proposition more cautiously: "In considering the *amount of evidence* necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved, which may be possessed by the parties respectively."

At present it is not necessary, nor do I desire to express a definite opinion upon the question. I make these observations solely to prevent any person being misled by the generality of the words I used in *Mahony's Case* (4). I need not say that these

(1) 5 M. & S. 206, at pp. 211, 212.
(2) 4 B. & Ald. 140.
(3) 13 M. & W. 655, at p. 662.
(4) [1900] 2 I. R. 273.

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observations in no way affect the *decision* in that case. As the defendants there received the goods, it lay upon them to prove that they handed them over to the other Company, who were acting as their agents, and consequently to prove the condition in which they then were.

PALLES, C.B.

In my opinion, the question reserved should be answered in the affirmative.

The question reserved was answered in the negative.

Solicitor for the plaintiff: *John K. Currie.*

Solicitors for the defendants: *O'Rorke & M'Donald.*

J. L.

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May 1.

REG. (PEEL) *v.* ARMAGH URBAN DISTRICT COUNCIL (1).

Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *sects.* 109, 115, 119 — "*Office*" — "*Existing officer*" — *Solicitor to former Township Commissioners.*

A practising solicitor, who, prior to 1898, had, as occasion arose, transacted legal business for the commissioners of a township, but had not been appointed by any resolution of that body, nor had been in receipt of any fixed salary, is not an existing "officer" within the meaning of the Local Government (Ireland) Act, 1898, nor entitled to compensation for loss of "office" upon his services being discontinued by the Urban District Council created under that Act.

MANDAMUS.

For the purposes of this report the facts of the case may be taken to be these. The prosecutor, Mr. J. E. Peel, a practising solicitor in Armagh, had, for some twenty years prior to the passing of the Local Goverment (Ireland) Act, 1898, acted as solicitor for the then township commissioners, but had not been at any time formally appointed as their solicitor by any resolution of that body, nor had their legal business been exclusively per-

(1) Before SIR P. O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

formed by him. In 1899 the new Urban District Council appointed Mr. Lavery, solicitor, of Armagh, to carry on certain legal business, upon which Mr. Peel had been previously engaged by a committee of the former Commissioners. Mr. Peel objected, and, his remonstrances being neglected, sent in a formal claim for compensation for loss of office. The Council declined to entertain the claim, and Mr. Peel applied for and obtained a conditional order for a writ of *mandamus* to compel the Council to take his claim into consideration, and to consider and assess the amount of compensation payable to him.

The Council having shown cause:—

Campbell, Q.C., and *C. Murphy* (with them *Ronan, Q.C.*) now moved that the conditional order be made absolute. They referred to sects. 109, 115, 119, 120, of the Local Government Act. The case (they contended) was governed by *Reg.* (*Brown*) v. *Wicklow County Council* (1). If a solicitor for a Grand Jury be entitled as a county "officer" to compensation, how can it have been the intention of the Legislature to exclude from compensation the corresponding official of other bodies whose duties were likewise transferred to the new Councils? The absence of a resolution, appointing the applicant to be solicitor to the Commissioners, afforded no distinction, seeing that his employment had been practically continuous: *Reg.* v. *Justices of Carmarthen* (2); *Reg.* v. *Justices of Bridgewater* (3); *Reg.* v. *Poor Law Board* (4); *Reg.* v. *Mayor of Norwich* (5); *Reg.* v. *Local Government Board* (6). A liberal interpretation was always given of the class entitled to compensation. If satisfied that the applicant was *de facto* permanently employed, it became immaterial whether the payment was by fees for work, as it was done, or by salary. The references in the Local Government Act, 1898 (and see Schedule VII., Part 2) to fees as well as salary, and the system of averages adopted for the assessment of compensation, showed that a fixed salary was not one of the essentials of such offices as the Legislature had in view when providing for compensation for loss of office: *Drew* v. *Metro-*

(1) [1900] 2 Ir. R. 351.
(2) 11 A. & E. 9.
(3) 6 A. & E. 339.
(4) L. R. 6 Q. B. 785.
(5) 8 A. & E. 633.
(6) 9 Q. B. 148.

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politan Board of Works (1). *Reg.* (*Holmes*) v. *Corporation of Drogheda* (2) was inconsistent with *Reg.* v. *Justices of Carmarthen* (3) and *Reg.* v. *Local Government Board* (4).

Hume, Q.C., and *Healy, Q.C.* (*Drumgoole* with them) for the Urban District Council:—

The applicant was merely casually employed by the Commissioners; there was no formal appointment whatever; there was no exclusive employment; and the Commissioners could have at any time employed another solicitor to act for them. Some degree of permanency of tenure was necessary to the idea of "office": *Reg.* (*Holmes*) v. *Corporation of Drogheda* (2); and, if not an "officer," the applicant could not be held to be an "existing officer." Save for the express wording of the 115th section, the "solicitor to a grand jury" would never have been held to be an "officer"; he was to be so "deemed," because otherwise he would not have come within the definition. *Brown's Case* (5), therefore, is clearly distinguishable. [They also referred to the Armagh Local Act, 1896 (59 & 60 Vict. c. cov, sects. 2, 53).]

Cur adv. vult.

May 1.

SIR P. O'BRIEN, L.C.J.:—

The question in this case is whether Mr. Peel the applicant is entitled to compensation under the provisions of the Local Government Act on his dismissal from the post of solicitor to the Armagh Urban District Council. He has been dismissed from that post, or perhaps I should say, the Council has refused to continue to employ him as their solicitor, and he seeks by writ of *mandamus* to compel the Council to award him compensation. Mr. Peel alleges that he was solicitor to the Town Commissioners of Armagh, and that being solicitor he was an officer of that body, and that, when that body became merged in or transmuted into the Armagh Urban District Council, he became an officer of that body. Indeed he alleges he did some business as solicitor for

(1) 50 L. T. (N. S.) 138.
(2) 13 Ir. L. R. 440.
(3) 11 A. & E. 9.
(4) 9 Q. B. 148.
(5) [1900] 2 Ir. R. 351.

them, and that now, when, apart from incapacity or misconduct on his part, the Council have appointed Mr. Lavery to do some legal work for them, he is entitled to compensation. The question depends upon the true construction of the 119th section of the Local Government Act. Was Mr. Peel an "existing officer" within the meaning of that section? If he was, he is entitled to compensation. I eliminate from the discussion the word "existing," and I apply myself to the word "officer." Was Mr. Peel an "officer"? In my judgment he was not within the meaning of that section an officer either of the Armagh Town Commissioners or of the Armagh Urban District Council.

It is stated, and it would appear, that he did not do all the work, and, in particular, the Court work of the Armagh Town Commissioners; but independently of this matter, he was not appointed by resolution to act as the solicitor of either body, nor did he receive a salary. He merely did the business of the Town Commissioners of Armagh as it arose from time to time. In the words of the Town Clerk, "from time to time, as occasions arose, Mr. Peel was instructed to transact legal matters for the Board of Town Commissioners of Armagh; but there is no resolution appointing him as solicitor to the Board, and he merely furnished his costs for the work he was instructed to do in the usual way." This was the position of Mr. Peel. Having regard to this position, was he "an officer?" A definition of that term is given in the 109th section of the Act. It is there enacted that "the expression office includes any office, situation, or employment." In my opinion this definition does not include a man employed to do mere casual jobs, who is remunerated from time to time as they arise, even though there may be an understanding that he is to do them as they arise, and to be paid accordingly. If this were so the definition would include a plumber, between whom and the Town Commissioners there was an understanding that he should do and be paid for doing the plumbing business of the body, as it from time to time arose. This would be an extreme and wholly untenable proposition.

The case of *The Queen* v. *Corporation of Drogheda* (1) may

(1) 13 Ir. L. R. 440.

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be usefully referred to. That case decided that an attorney of a corporation does not as such hold an office within the borough for the loss of which he is entitled to compensation under 3 & 4 Vict. c. 109, sect. 11. No doubt the words of the 3 & 4 Vict. c. 109, would point to a corporate office, and the words of the Local Government Act, it may be argued, are more comprehensive than the words used in 3 & 4 Vict. c. 109; but I think the language of Chief Justice Blackburne is very apposite and relevant to this case. He is reported to have said:—

> "When we consider the nature of the employment and services and duties of a law agent or attorney it is not easy to conceive that he would be described as an officer or a person holding an office within the borough or body corporate, or the Corporation that employed him. An attorney employed to transact the legal business of the Corporation is employed by them as if he was employed by any individual person; his rights, his duties, and his services, are just the same in both cases; nor can I distinguish in reason or fact any ground for saying that he holds an office that would not extend to every person who was in the habit of being employed by the Corporation. If a law agent be an officer, so should a land-agent or an architect, or even a tradesman that the Corporation may have usually dealt with or employed."

Such is the language of Chief Justice Blackburne, and in my judgment this language is, as I have said, quite apposite and relevant to the present case, and shows that, if we yielded to the application of Mr. Peel, we would strain the language of the Act of Parliament so as to make it comprise persons never contemplated to come within the scope and purview of the Local Government Act. The *Bridgewater Case* (1), and nearly all the other cases relied upon by Mr. Campbell, were cited in the *Drogheda Case* (2). These were distinguished. They were cases in which there was the element of the continuity of duty as distinguished from casual employment, or of fixed salary, or of both.

Reg. (*Brown*) v. *Wicklow County Council* (3), decided in this Court, does not in any way militate with the view I take. In that case we held that Mr. Brown, who was appointed by resolution as solicitor to the Grand Jury, fulfilled the description of "County Solicitor." He was one of a class that might be described

(1) 6 A. & E. 339. (2) 13 Ir. L. R. 440. (3) [1900] 2 Ir. R. 351.

as *personæ designatæ*, and the Act directed that he should be "deemed" an officer of the Grand Jury. We attached special effect to the word "*deemed*." We all know that those who served under the Grand Juries in Ireland apprehended that they might not receive due consideration at the hands of the new bodies that the Local Government Act was about to call into existence, and that they pressed for special precautions in the contemplated legislation, and it would appear to me that the Legislature paid special regard to their interests.

The motion must be refused with costs.

GIBSON, J.:—

The authorities relating to legislation *in pari materia* on compensation for loss of office relied on by the applicant's counsel have only a very remote bearing on the facts and statute with which we have to deal. They are of three classes, and decide:—(*a*), that a person filling an office with continuous duties, remunerated by salary, may be entitled to compensation, though his office was not held under any formal legal appointment; (*b*), that under certain statutes a place may be deemed to be the subject of compensation, though it is not in strictness technically a legal office; (*c*), that an office, the occupant of which as incident thereto enjoys emoluments or advantages, may be entitled to compensation for the loss of such emoluments or advantages. These authorities do not govern the present case, where a solicitor, without any formal appointment and without any salary has for a number of years transacted the legal business of a public body, his duties being discontinuous, and arising from time to time as his services were required, and his remuneration consisting of fees for the work done. The case, however, of *Reg.* v. *Drogheda Town Council* (1), cited by the defendants' counsel, is more in point. It was there decided that a solicitor who had been regularly appointed law-agent did not hold an office or place of profit under 3 & 4 Vict. c. 109, which, like 5 & 6 Wm. 4, c. 76 (the subject of decision in the *Bridgewater Case* (2), by treating "office, place, situation, employment, and appointment," as convertible terms, enlarged the meaning of the word "office." Mr. Campbell, Q.C., argued that

(1) 13 Ir. L. R. 440. (2) 6 A. & E. 339.

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there was an essential difference between the employment of a solicitor and that of an architect or tradesman to whom, in accordance with a standing direction or usage, business is given: *The Drogheda Case* (1) is a conclusive answer to this argument.

The question before us is whether Mr. Peel was an existing officer within the Local Government Act, 1898. Three points are relied upon. The first of these is the definition in section 109. This, however, is hardly sufficient, having regard to the decision in the *Drogheda Case* (1). The second argument is founded on the use of the term "county solicitor" in section 115, sub-section 1, which it is said must be applied *cy près* to the solicitor of Town Commissioners under section 119. The expression is taken from the English Act, but the research of counsel has failed to discover any mention of such a functionary in any previous statute, case, or text-book, or to ascertain his duties or terms of appointment in England. In *Brown's Case* (2) we held that the solicitor of a Grand Jury most nearly approached what a county solicitor might be supposed to be; and that the County Council having declined to recognise his status as an existing officer, the solicitor could enforce his right by *mandamus*. This latter point is in accordance with the view of the Exchequer Chamber in the *Sandwich Case* (3).

In *Brown's Case* (2) there was a formal resolution appointing the solicitor; and during the argument I expressed the opinion (to which I adhere) that what the statute contemplated was a continuing and not a casual employment. Section 115, sub-section 18, directs that the transferred officer is to receive not less remuneration than heretofore. This cannot mean of course that a solicitor who is not paid by salary can insist on the average amount of previous business being maintained; but it points conclusively to a continuous employment. A solicitor engaged casually in doing Grand Jury work in March, 1898, and March, 1899, would not become, I think, thereby a county solicitor any more than a regularly appointed solicitor would cease to fill that character by reason of having no actual work in hands at those periods. In this case Mr. Peel was not appointed by resolution to any continuing post; if he had asked for such an appointment, he might have been refused.

(1) 13 Ir. L. R. 440. (2) [1900] 2 Ir. R. 351. (3) 10 Q. B. 563.

The structure of sect. 115, sub-sect. 1, is curious, and why it was thought necessary to describe all the specially enumerated functionaries as officers of the Grand Jury, I do not know. The evanescent character of a Grand Jury may, to some extent, account for the frame of the section. Some of the officers were, like the county surveyor, within the designation of county officers without any special words. The object may have been to transfer specified officers under a generic classification as officers of the Grand Jury to the County Council as distinct from the Urban County District. Mr. Peel is plainly not a county solicitor, and sect. 119 does not invest him with that position *cy près*. That section only applies to "existing officers," that is, persons who would be rightly so described.

It is urged that sub-section 2, of section 115, proves that a modified or adapted meaning must be put on the officials described in sub-sect. 1. That sub-section, however, only relates to places where there was a Grand Jury, and Armagh was not such a place.

The last argument put forward was that, if the solicitor to a Grand Jury is deemed an existing officer, no reason can be suggested for placing the solicitor of Town Commissioners in a worse position. This has caused me more difficulty than any other point in the case. The *Drogheda Case* (1), no doubt, shows that a solicitor is not properly described as an officer, but when we find that the solicitor for a fluctuating body is so designated in terms, it makes one ready to expect that "officer" in this statute might embrace such a person as Mr. Peel. With some doubt I have come to the conclusion that the favour shown to this particular class of solicitor, the county solicitor, who may have been deemed an officer especially needing protection, cannot, by implication, be extended to other solicitors of public bodies such as Town Commissioners.

There are two difficulties in the applicant's way. The first of these is that he has no formal appointment—an objection which would not be insuperable if his employment was an office. The more persuasive answer to his claim is that his duties were discontinuous, and remunerated by fees for the work entrusted to him from time to time. The two objections play into one another.

(1) 13 Ir. L. R. 440.

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The *Drogheda Case* (1) is a strong authority against Mr. Peel unless the mention of the county solicitor enlarges the scope of the word "office," so as to embrace all solicitors. The terms of the Seventh Schedule, Part 2, relied upon as showing that there are offices paid by fees or otherwise than by salary, give no help. The schedule speaks of an appointment, and there are, unquestionably, many posts recognised by the statute of which the remuneration is in fees and poundage (*e.g.* a collector or county solicitor), while to many salaried offices incidental emoluments are attached.

In deciding against Mr. Peel, I do not hold that a solicitor employed at a salary would not be an officer. It was argued that there was no difference between a solicitor at a salary and a solicitor paid by fees. The *Drogheda Case* (1) seems adverse to this; but it may be that a solicitor, holding an appointment of a continuing character, might, under special circumstances, be deemed an officer, though he was to be remunerated exclusively by fees. This must be left to future decision.

On the facts before us I do not feel at liberty to supplement what may be defects in the statute, by holding that Mr. Peel, who certainly was not an officer within the Armagh Act of 1896, or the Act 3 & 4 Vict. c. 109, filled the character of existing officer under the Local Government Act. To introduce him into the Act, the Court would have to go upon speculative implication arising from the mention of that mysterious official, the county solicitor. There is no other tangible argument. The Court may think it would have been fair to have included Mr. Peel in the Act, but we cannot supply an omission by conjecture.

KENNY, J.:—

If the incorporating words of the 119th section were out of the case I would feel no difficulty in holding that Mr. Peel is not an existing officer within the meaning of the Local Government Act. He has, no doubt, acted as solicitor for the late Town Commissioners in practically all their business for over twenty years, and has enjoyed and—had there not been a change in the local authority—would in the future most probably have continued to enjoy a position quite as permanent as that of a solicitor for a Grand Jury,

(1) 13 Ir. L. R. 440.

appointed by resolution, who, by the decision of this Court in the *Wicklow Case* (1), has been held to be an "existing officer." In the view I take I do not think it makes any difference whether the position of solicitor to the public authority is one owing its origin to a special resolution of the body, or to an oft-repeated and substantially-continuous retainer. The *Wicklow Case* (1) was decided on the words of the 115th section, sub-sect. 1, which deems a "county solicitor" to be an "officer of the Grand Jury," for the purposes of transfer; and all that this Court had to do was to lay its finger on the "officer" in the county who would fill the description of "county solicitor." There was evidently no one unless the solicitor who was in the habit of acting for the various grand juries of the county, who could be regarded as the "county solicitor"; and the Court having arrived at that determination, the Act of Parliament, in effect, said that whatever the *primâ facie* status of such solicitor might be, and no matter what conclusion, apart from the language of the section, might be arrived at as to his being an "officer," he was to be deemed to be one for all the purposes of the Act. If the Court held that he was not an "officer of the Grand Jury," it would be giving no effect whatever to the section. The Court was coerced to hold that he was within the Act once it was satisfied that he filled the description of "county solicitor."

If, then, what may be called the "deeming" clause of the 115th section, sub-sect. 1, could be incorporated *mutatis mutandis* in the 119th section, so as to make it applicable to a District Council, I would be clearly of opinion that the *Wicklow Case* (1) would bring Mr. Peel in as an "officer" of the late Town Commissioners. But, in my opinion, the clause is not incorporated. The 119th section deals with provisions of the Act respecting officers "transferred" to a County Council, and declares that these provisions shall apply to all existing officers of an Urban District Council or Town Commissioners. It would seem to me that this section only applies provisions of the Act which are applicable to officers *after* the transfer has actually taken place, and there are many clauses of sections 115, 117, and 118, which would satisfy the conditions of such application. If it were intended to apply the

(1) [1900] 2 Ir. R. 351.

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"deeming" clause of section 115, it is manifest that a number of the offices mentioned in it have no place in the system of an Urban District Council or Town Commissioners; and, in my opinion, it would require express language to make applicable a clause which for its adaptation would require considerable modification.

It only remains to consider whether, if the "deeming" clause does not apply, Mr. Peel can be regarded as an "existing officer." He was not appointed by any resolution; he had no fixed salary; he from time to time furnished his bill of costs for each branch of business he was employed to transact; and it was within the competence of his clients, the Town Commissioners, to dispense with his services at any time without being subject to any liability for damages for wrongful dismissal.

The *Drogheda Case* (1) is a direct authority for holding that in such circumstances a solicitor did not hold an "office or place of profit." In the Act, 3 & 4 Vict., c. 109, s. 11, which in that case gave the compensation, "office or place of profit," received a practical interpretation, inasmuch as the official was to send in a statement, setting forth the fees received by him for five years, "distinguishing the office, place, situation, employment, or appointment." In the present Act (sect. 109), "office" is interpreted as including "office, situation, or employment." I think it is clear Mr. Peel does not hold a "situation" or "office"; and, though he was "employed" when he acted as solicitor, I am of opinion that the Act did not contemplate an employment, casual in its nature, and possibly not even existing on the two important dates mentioned in the definition of "existing" in the 109th section. If the solicitor was transacting no business for the Commissioners on the last day of March, 1898, or the 21st February, 1899, could it be said that the employment was held by him on these days? If not, is it conceivable that the Act intended to include an employment of so temporary and precarious a character? I cannot think that it did. The provision for remuneration of existing officers in sect. 115, sub-sect. 18, might be relied on as a further argument that the office of a solicitor was not contemplated; but I lay no stress upon it, because its application becomes as difficult in the case of a Grand Jury solicitor as in the case of a solicitor to Town Commissioners.

(1) 13 Ir. L. R. 440.

I am, therefore, of opinion that Mr. Peel cannot be regarded as an "existing officer" within the meaning of the Act.

Solicitors for the applicant: *Monroe & Anderson.*
Solicitor for the Armagh Urban District Council: *P. Lavery.*

A. E. R. J.

KENEALY *v.* O'KEEFFE (1).

Local Government—Disqualification—Penalty—Right to prosecute—Common informer—Appropriation of penalty.

Any member of the public may prosecute for penalties under Article 12, clause 11, of the Application of Enactments Order of December, 1898, for acting as a District Councillor when disqualified, and it is competent to the Justices, under sect. 22 (8) of the Petty Sessions Act, to award to the prosecutor a part of the penalty, not exceeding one-third.

CASE STATED by the Justices of county Kilkenny sitting at Kilkenny Petty Sessions on the 28th November, 1899, for the opinion of the Queen's Bench Division, pursuant to 20 & 21 Vict. c. 43, in the matter of a complaint at the prosecution of C. J. Kenealy against Patrick J. O'Keeffe, charging that the defendant did on the 3rd July, the 7th August, the 19th September, and the 31st October, 1899, act as a member of the Corporation of Kilkenny, and of the Urban District Council of Kilkenny, the defendant being at the time disqualified from being a member of such Corporation and Council by reason of being concerned by himself or his partner in a bargain or contract entered into with the said Corporation or Council or participating by himself or his partner in the profit of such bargain or contract.

When the case came on for hearing, the Justices, upon the objection of counsel for the defendant, adjudged that the complaint be dismissed without prejudice, with costs. The preliminary objection so taken by counsel for the defendant was that the

(1) Before PALLES, C.B., and JOHNSON, GIBSON, and KENNY, JJ.

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complainant was not entitled to prosecute under the Local Government (Ireland) Act, 1898—Article 12 of the Local Government (Application of Enactments) Order of the 22nd December, 1898—the right to prosecute thereunder being vested solely in the Crown. In support of this view the case of *Bradlaugh* v. *Clarke* (1) was cited; and it was further relied upon before the Justices that, although the 4th Schedule to the Local Government (Ireland) Act, 1898, gave power to apply certain sections of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50)—sect. 224 of the latter Act (which declared that an action could not be brought except by a burgess of the borough) was not included amongst these sections; and it was submitted that such omission indicated an intention on the part of the Legislature to confine the right of prosecution, in such a case as the present, to the Crown. For the complainant it was contended that he was entitled to prosecute, inasmuch as under the statute (section 12, sub-section 11) the case was one of summary jurisdiction, and was consequently governed by the rules and procedure of the Acts affecting summary jurisdiction, under which it was submitted that the complainant was entitled to prosecute either as a burgess of the borough or as a common informer; and that the case of *Bradlaugh* v. *Clarke* (1), if applicable, had relation only "to the power of sustaining suits at the civil side of the Court, and did not touch the criminal jurisdiction."

The Justices being of opinion that the complainant was not entitled to act as prosecutor, and that the right to prosecute was vested solely in the Crown—inasmuch as it did not appear (to them) that it was a necessary and imperative inference from Article 12, sub-section 11, of the Local Government (Application of Enactments) Order of December 22, 1898 (2), that the procedure, though of a summary character, was to be regulated, in respect to the person capable of becoming a prosecutor in the case, by the Acts affecting summary jurisdiction; and inasmuch further as there did not appear to be any limitation to the application of the decision in *Bradlaugh* v. *Clarke* (1), with which the case seemed (to them) to be practically identical, such as to justify them in ignoring the clear statement of the law as laid down in that case,

(1) 8 App. Cas. 354. (2) Vanston, p. 182.

or in adopting the inference sought to be drawn from Article 12, sub-section 11—dismissed the complaint, without going into evidence. At the complainant's request the Justices now stated this case, to the effect above set forth, upon the question whether they were right in point of law in their determination, and as to what should be done in the premises.

W. G. Gibson, and *T. M. Healy, Q.C.*, for the appellant.

J. J. Clancy, and *J. H. Campbell, Q.C.*, for the respondent.

[In addition to the authorities cited in the judgment counsel referred to *Reg.* v. *Labouchere* (1); *Reg.* v. *Yates* (2); *Templeman* v. *Trafford* (3); *Shackell* v. *West* (4); *Bruce* v. *M'Alister* (5); *Powell* v. *Castletown* (6); *Stevenson* v. *O'Neill* (7); *Fleming* v. *Bailey* (8)].

Cur adv. vult.

The judgment of the Court was delivered by—

PALLES, C.B.:—

Dec. 19.

The question in this case is whether a private person can prosecute for a breach of Article 12, sub-article 11, of the "Local Government Application of Enactments Order, 1898." That order was made under section 104 of 61 & 62 Vict. c. 37, which enacts that there shall apply to Ireland so much as the Lord Lieutenant, by Order in Council, declares applicable, of the English and Scottish enactments specified in the 4th schedule to that Act, with such adaptations of the said enactments as appear necessary or expedient for carrying into effect their application to Ireland.

I understood it to have been suggested by Mr. Campbell that the sub-article in question was not an adaptation of any of the specified enactments; but, as the 107th section of the Act provides that an order, unless annulled as thereby provided, shall be deemed to have been duly made and passed within the powers conferred by the Act, and that no objection to its validity shall be taken in any proceeding, this suggestion cannot be considered by us.

(1) 12 Q. B. D. 320.
(2) 11 Q. B. D. 750.
(3) 8 Q. B. D. 397.
(4) 2 Ell. & Ell. 326.
(5) 8 L. R. Ir. 195.
(6) 30 L. R. Ir. 93.
(7) Ir. R. 11 C. L. 134.
(8) 5 East, 313.

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The material words of the sub-article in question are:—"If any person acts when disqualified . . . he shall for each offence be liable on summary conviction to a fine not exceeding £20."

It is clear that this sub-article creates a criminal offence in respect of a matter of public policy and utility which concerns the public generally as distinguished from any particular individual. It does not specially direct by whom the proceeding to procure a conviction shall be instituted, nor is there any express provision in it that the informer or prosecutor shall be entitled, for his own use, to any part of the penalty.

The Justices decided that the appellant was not entitled to institute the prosecution, basing their conclusion upon the well-known decision of the House of Lords in *Bradlaugh* v. *Clarke* (1). That case, however, was a civil action to recover penalties, not a criminal proceeding to obtain a conviction for an offence and the appropriate award of the penalty as a punishment for that offence. Lord Selborne bases his judgment upon the incontestable proposition of law, that, "where a penalty is created by statute, and nothing is said as to who may *recover* it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain *a suit for it*." "This proposition," says Lord Selborne, "rests on a very plain and clear principle. No man can sue for that in which he has no interest; and a common informer can have no interest in a penalty of this nature, unless it is expressly or by some sufficient implication given to him by the statute."

Lord Bramwell, in *Robinson* v. *Currey* (2) to which Gibson, J., has referred us since the argument, distinguished between such an action and a proceeding in which the "informer" is "suing for a penalty in pursuance of a public duty, as a kind of public prosecutor, upon the same principle upon which he might prosecute an indictment at law, if an indictment would lie where a thing is prohibited and no penalty is fixed." No doubt, however, the matter in relation to which this distinction was there drawn, viz. the application of certain Statutes of Limitations, was different from that in the present case.

In cases of indictable offences the title of a prosecutor to prefer

(1) 8 App. Cas. 354. (2) 7 Q. B. D. 472.

a bill of indictment does not depend upon pecuniary interest. The prosecutor, as one of the public, puts the criminal law in motion, not for his own private profit, but to procure the infliction of punishment for an offence against the public of which he is one.

Further, it is certain that, prior to the 56 Geo. 3, c. 104, it was open to everyone to institute proceedings for offences against the revenue (1); and, at common law, an information *in rem* might be exhibited, not only by the Attorney-General but by the person making the seizure or the discovery (2). The authorities are clear that the right of the informer in revenue cases to take such proceedings does not depend upon his interest in the penalty, because, in cases in which, the penalty was claimed for the King and informer, although the statute creating the offence did not give any part of it to the latter, the Court, instead of dismissing the information, gave judgment for the Crown for the entire penalty: *Oldfield* v. *Blaydwin* (3); *Roe* v. *Roe* (4); and *Malden* v. *Bartlett* (5).

In the absence of decisions or practice to the contrary it would seem reasonable to infer from these premises that when justices acquired a jurisdiction to dispose summarily of particular new offences created by statute, *primâ facie*, any member of the public might lay an information in respect thereof. This *primâ facie* inference might necessarily be rebutted in either of two ways: first, by that which was constituted an offence, instead of being matter which affected the public generally, being no more than a grievance to a particular person. In such a matter the public *as such* had no concern. Secondly, by the statute creating the offence negativing, or limiting, the general right. But, if the offence was one against the public generally, then the mere circumstance that a member of the public had no pecuniary interest in a conviction, would appear to be insufficient to rebut the inference, because it was not upon any such pecuniary interest that his *primâ facie* right to proceed depended.

Passing now from principle to usage, there is no doubt that long established practice is in accordance with the *primâ facie* inference I have mentioned. In 1st Burn's Justice, 30th edition,

(1) Manning's Exch. Practice, 208.
(2) *Ibid.* 142.
(3) Mich. 7 Anne, Roll, 51.
(4) Hardres, 185.
(5) Parker, 105.

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page 1106, it is laid down that, generally speaking, any person may be the informer; but sometimes the statute giving the penalty allows only particular persons to be the informers. The same principle is to be found in words more or less similar in all books in relation to the duties of Justices of the Peace. See Paley on Convictions, p. 78; Nun and Walsh's Justice of the Peace, p. 479; Molloy's Justice of the Peace, p. 172; Oke's Magisterial Synopsis, 14th ed., p. 42; and Stone's Justice of the Peace, pp. 36, note (*a*), 704, 705. Indeed the principle has been so long and so universally applied that it is not easy to find decisions dealing with it as a matter requiring judicial determination.

Incidentally, however, it is occasionally mentioned, usually either in cases in which some alleged special title in the prosecutor failed in proof, or in those which were alleged to be exceptions from the general rule. But no case, that I am aware of, can be found in which the general rule itself was denied.

In the first instance, then, I shall mention two cases, in one of which Cockburn, C.J., and in the other Lindley, L.J., and Kay, L.J., constituting the Court of Appeal, treat the rule as I have stated it.

In *Cole* v. *Coulton* (1) the prosecution was under the Towns Police Clauses Act, 1847, 10 & 11 Vict. c. 89, sect. 35, which enacted that every person keeping any house for the sale or consumption of refreshments, who knowingly suffered common prostitutes to assemble at, and continue on, his premises, should be liable to a penalty. By the statute for the improvement of King's Lynn, it was provided that Justices who inflicted any penalty under the last-mentioned Act were to award it to be paid either to the Corporation, or to the Paving Commissioners of King's Lynn, according as the proceeding for the penalty was taken on behalf of one or the other of those bodies. Therefore one of the public, as such, could not have any pecuniary interest in the penalty. The appellant, a licensed ale-house keeper at King's Lynn, was convicted by Justices, on an information laid by the respondent, the clerk of the Paving Commissioners, in a penalty under the above-mentioned section. A question arose as to the authority of the clerk to lay the

(1) 2 E. & E. 695.

information; and Cockburn, C.J., in giving judgment, held that the respondent had not any such authority, express or implied.

Proceeding upon this basis, the Chief Justice said:—

> "I am, however, of opinion that, independently of any authority from the Commissioners, it was competent to the respondent to lay the information, so long as he professed to lay it in accordance with the directions of the local Act that the penalty was to enure for the benefit of the Commissioners. The case is not that of a grievance to an individual, in respect of which a penalty is given by statute to the party aggrieved by way of redress; but the offence is one against public decency and propriety. The general Act makes every person committing the offence liable to the penalty, and *does not prohibit* anyone, who may choose, from laying the information. The special Act engrafts upon this a special provision that the penalty, when imposed, shall go to one or the other of two specified bodies, according as the proceeding is on behalf of one or the other. The only restraint, therefore, put by the special Act upon the power of an individual to lay the information is that he must claim the penalty on behalf of one of the bodies named in the Act."

This judgment in *Cole* v. *Coulton* (1) (as we learn from the Master of the Crown Office in London) regulates to the present time the practice of the Queen's Bench Division in England.

The Queen v. *Stewart* (2) was a decision of the Court of Appeal, in which it was held that a private person might prefer an information under the Diseases of Animals Act, 1884, and the Orders thereunder. There is a distinction between that statute and that in question here, as there half the penalty was given "to the person who proceeds for the same." But I refer to the case as showing the view of the Court as to the ordinary rule, in the absence of special reasons to the contrary.

Lindley, L.J., in giving judgment, there refers to certain provisions, which were relied on as limiting the persons entitled to lay informations, as not sufficient to exclude "*the ordinary right of any person* to prefer an information."

Kay, L.J., says:—

> "*Prima facie*, there is no doubt that *anybody may take proceedings to recover a penalty*. That is an old rule, and is well established. The

(1) 2 E. & E. 695. (2) [1896] 1 Q. B. 300.

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Act now under consideration in terms provides that penalties shall be imposed for certain acts, and that those penalties shall be regarded as though they were penalties incurred under the Summary Jurisdiction Acts. In order to prevent the application of the *general rule*, it must be shown that the Act in plain terms prevents anyone, except certain specified persons, from prosecuting for offences under the Act."

Taking now the general rule to be as I have stated, it is next to be considered whether the present case is within it. The only circumstance relied on as excluding it is the assumption that no part of the penalty can be awarded to the prosecutor. Whether this assumption be correct I shall hereafter consider. For the present I shall assume it to be so.

There is no doubt that there is one mode in which the express appropriation of the entire penalty to a particular person may be a circumstance to be considered in determining whether a particular case is excluded from the general.

But the mode in which, and the reason for which, it can be so considered seems to me to depend upon the general rule being limited to cases in which the offence is against the public generally, as distinguished from a particular individual only. The very terms of the rule, therefore, exclude cases in which mere private grievances are made the subject of summary criminal proceedings. But the fact that the entire penalty is by the statute appropriated to a particular party may, *inter alia*, be relied on to show that the offence created by the statute was one against that individual only, and not against the public generally. Of this class was *Reg.* v. *Hicks* (1). In that case the enactment was that "anyone who," with certain exceptions, should "sell elsewhere than in the market goods liable to market tolls, should forfeit and pay *to the company* any sum not exceeding forty shillings." The Act in which this provision occurred was one which constituted a company with authority to construct, and to demand, tolls in respect of a market-house, which was to be the only one in Torquay. The *ratio decidendi* of Lord Campbell there was that the provision in question was to ensure to the company a suitable return for their outlay, and was not for the benefit of the inhabitants of Torquay.

(1) 4 E. & B. 633.

If, however, upon the true construction of the statute, the offence is one against the public, and not against a particular individual only, then I am of opinion, as well upon principle as upon the authority of *Cole* v. *Coulton* (1), and uniform usage, that the mere circumstance of the entire penalty being appropriated to a person other than the informer does not take the case out of the general rule.

For the purposes of this judgment it is unnecessary to discuss a second class of cases to which the general rule is inapplicable, viz. those in which, although the offence is one against the public, the statute, by expressly conferring the right to lay an information on particular persons, has been held impliedly to negative the right of a member of the public to sue. Every case of this class must depend upon the construction of the statute as a whole; and, as to the case of this class which has been cited: *Reg.* v. *Cubitt* (2), it is unnecessary to say more than that the *ratio decidendi* there was the existence in the statute (46 & 47 Vict. c. 22, s. 11) of the words:—"The provisions of this Act . . . shall be enforced by Sea Fishery Officers"; words, to give any effect to which, it was necessary to hold excluded the right of a common informer to proceed: as, if anyone had that right, so would have had the Sea Fishery Officers, without the express words.

In the present case there are no words defining by whom proceedings shall be taken; the offence is one against the public generally; and there is not a word which can be held to negative the application of the general rule. Upon this ground alone, and without reference to the question whether the appellant may not be declared entitled to part of the penalty, I cannot entertain any doubt that he was entitled to issue the summons, and consequently that the decision of the Justices is wrong.

To this I have not referred to the arguments upon the question of the alleged possibility of the appellant being awarded portion of the penalty; but, as its existence, if it does exist, would add additional force to the arguments in support of his right to institute the proceedings, I should not be altogether silent as to it.

By the Fines Act of 1874 (37 & 38 Vict. c. 72, s. 5), it was

(1) 2 E. & E. 695. (2) 22 Q. B. D. 622.

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provided, *inter alia*, that where "by any Act . . . hereafter to be passed, it is enacted that penalties . . . may be recovered in a summary manner, and no further provision with respect thereto is contained in such Act, then such penalties . . . shall be recoverable, with respect to parts of Ireland other than the police district of Dublin metropolis, before a Justice or Justices of the Peace sitting in Petty Sessions, subject and according to the provisions of the Petty Sessions (Ireland) Act, 1851, and any Act amending the same."

By sect. 22, sub-sect. 8, of the Petty Sessions Act, thus made applicable to the sub-article in question, it is provided that in every case where, by the Act under which any penal sum shall be ordered to be paid as a penalty for an offence (and no sum shall be awarded to the complainant as compensation for damage), it shall be lawful for the Justices to award any sum, not exceeding one-third of such penal sum, to the prosecutor as informer.

Were there no other legislation in point there would, under this provision, be a possibility of an informer or prosecutor receiving a portion of the penalty.

Mr. Campbell, however, who appeared for the respondent, referred to two statutable provisions, the joint effect of which, he insists, is to render the abovementioned 22nd section inapplicable, and to deprive the Justices of the power of giving the prosecutor in the present case any part of the penalty.

The first of these provisions is sect. 13 of the Fines (Ireland) Act (14 & 15 Vict. c. 90), 1851. The commencement of that section is *verbatim* the same as the provision which I have read from the Petty Sessions Act; but it then contains a proviso that nothing therein contained "shall be construed to alter the appropriation or application of any fine or penalty imposed . . . by the Justices in any corporate town, and payable to any borough fund; but the same shall continue to be appropriated and applied as is now by law authorised."

The second provision referred to by Mr. Campbell is sect. 197 of 3 & 4 Vict. c. 108:—"That when by any Act any penalties . . . shall hereafter be made recoverable in a summary manner before any Justice or Justices of the Peace, and by such Act . . . the same shall be limited and made payable to Her Majesty, or to

any body corporate, or to any person whomsoever, save and except the informer, who shall sue for the same; the same, if recovered and adjudged before any Justice in any borough in which a separate Court of Sessions of the Peace shall be holden, . . . shall, notwithstanding anything in such Act . . . contained, be recovered and adjudged to be paid to the treasurer of such borough for the time being, to the credit and on account of the borough fund of such borough."

Mr. Campbell's argument was that the penalties in question, by reason of their not being expressly appropriated, in law, result to the Crown, they are in law "limited and made payable to Her Majesty" within the meaning of sect. 197 of the last-mentioned Act, and that the case is governed, not by sect. 22, sub-sect. 8, of the Petty Sessions Act (14 & 15 Vict. c. 93), but by sect. 13 of the Fines Act (14 & 15 Vict. c. 90).

It is impossible to yield to this contention, for two reasons:—

1. Construing together the two Acts of 14 & 15 Vict. cc. 90 and 93, which were passed on the same day, as sect. 13 of the former is apparently inconsistent with sect. 22, sub-sect. 8, of the latter, the more limited of those enactments must be read as an exception out of the more general. As, then, sect. 22, sub-sect. 8 of c. 93 is confined to penalties in cases of summary convictions before Justices, and sect. 13 of c. 90 is not subject to any express restriction, sect. 22, sub-sect. 8, of c. 93, must be taken to regulate the appropriation of penalties in cases within it; and sect. 13 of c. 90 will apply to penalties recovered before other Courts. Therefore, the proviso preventing the appropriation of penalties in cases within 3 & 4 Vict. c. 108, s. 197, is inapplicable to it.

2. Again, even were the penalty in the present case within sect. 13 of 14 & 15 Vict. c. 90, it would not be within 3 & 4 Vict., c. 108, s. 107, because the only cases embraced by the latter are those in which the allocation of the penalty is made by the Act itself:—"When *by any Act* any penalties or forfeitures are . . . recoverable in a summary manner . . . and by such Act the same are . . . *made payable* to Her Majesty . . . or to any person whatsoever, save and except the informer, who shall sue for the same, or any party aggrieved"—that is, there must be *by the Act itself* an *exclusion* of the informer.

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In the present case, in the Article, or in the Act of which it is to be taken to be part, there is no appropriation of the penalty. By reason of such absence of appropriation, such penalty would, were it not for sect. 22, sub-sect. 8, of 14 & 15 Vict. c. 93, go entirely and absolutely to the Crown; but the effect of the latter section is to empower the Justices to award part of it, not exceeding one-third, to the informer.

In the present case, therefore, I am of opinion that the Justices may make such an award to the appellant; and the possibility of such an award being made, in my opinion, affords as strong an argument in support of the appellant's right to proceed, as if he had an absolute title to the aliquot part.

I may add, in conclusion, that once sect. 22, sub-sect. 3, is held to be applicable to the case, it affords an almost unanswerable argument in favour of the appellant; for, were one of the public not entitled to do so, in whose favour could the Justices exercise the power thus conferred upon them?

Upon the whole, then, I hold without any doubt that the appellant was entitled to issue the summons; that the decision of the Justices must be reversed; that the case must be remitted to them to proceed therein according to law; and that the respondent must pay the costs of the case.

Solicitor for appellant: *N. Shortall.*
Solicitor for respondent: *James Harte.*

J. H. P.

IN RE M., AN ARRANGING DEBTOR (1).

Appeal.
1900.
July 27.

Bankruptcy—Vesting property in the Official Assignees for the purpose of an arrangement—Proposal to pay interest on debts and premiums on policies of insurance on his life—Proposal, whether reasonable and proper.

An arranging debtor was, at the date of presenting his petition, entitled to household furniture worth £1000, and he had a life interest in a landed estate, producing a net rental of £2000 a-year, which was mortgaged for its full value; he had also policies of insurance on his own life for £163,120, the surrender value of which was £12,697. The debts were—fully secured creditors, £111,100, partially secured after deducting the value of the securities, £26,299, and unsecured £7234; making the total liabilities, exclusive of fully secured creditors, of £33,533. The debtor's proposal was to pay or provide annually such sum as might be required to pay the annual interest, at the rate of 4 per cent. per annum, upon all the unsecured debts, and upon so much of the partially secured debts as might be proved or admitted for dividend against his estate, and to continue to pay interest on the debts until the debts should be paid out of the policies; also to pay the premiums on the policies, and to charge his equity of redemption in the policies with the payment of the said debts, interest, and premiums. For the purpose of effecting this arrangement, the petitioner undertook to vest by deed in a trustee his interest in the policies, by way of security for the ultimate payment of the debts and interest out of the policies; the deed was to contain a covenant by the debtor for payment of interest on the debts, and for the up-keep of the policies, and, in case of default by the debtor in making these payments, the creditors were to be remitted to their original rights. Boyd, J., being of opinion that the proposal was not reasonable or proper unless the equity of redemption in the policies was vested in the official assignees, made no rule on the first sitting:—

Held (reversing the decision of Boyd, J.), that the omission to vest the equity of redemption in the policies in the official assignees was not of itself sufficient to render the proposal unreasonable and improper.

THE arranging debtor, at the date of the petition for arrangement, was possessed of the following assets:—Household furniture and effects, £1000; a life interest in the M. Estate, producing a net rental of £2000 per annum, which was in the possession of a first

(1) Before FITZ GIBBON, and HOLMES, L.JJ.

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mortgagee for £35,000, and policies of insurance on the debtor's life, amounting to £163,120, the surrender value of which was £12,697.

The claims against the estate were:—Unsecured creditors, £7,234 3*s.* 4*d.*; fully secured creditors, £111,100 4*s.* 7*d.*; partially secured creditors, after deducting the value of their securities, £26,299 15*s.* 10*d.*; and preferential liabilities, £236 2*s.* 2*d.*, making a total of liabilities, exclusive of the fully secured creditors, of £33,533 19*s.* 2*d.*

At the first private sitting, which took place on the 8th May, 1900, the proposal made was:—"To pay or provide annually such sum as may be required to pay the annual interest at the rate of 4 per cent. per annum from the date of the filing of the petition in this matter upon all the petitioner's unsecured debts and engagements, and upon so much of his partly secured debts as may be proved or admitted for dividend against his estate as unsecured, and to continue to pay or provide such interest annually until the said debts have been paid off in full, with such interest as aforesaid, by perception of the policy moneys hereinafter mentioned, or otherwise, and also to provide for the up-keep of certain policies of assurance specified in the Petitioner's Statement of Affairs, List J., Nos. 1 to 7, both inclusive, for sums amounting in all to £163,120, and to charge his equity of redemption in said policies, with the payment of said debts, interest, and premiums, but subject to the claims of existing incumbrancers thereon according to their proper priorities. For the purpose of effectuating this arrangement the petitioner undertakes to vest by deed in H. M. B." (a named trustee) "all his estate and interest in the said several policies of insurance hereinbefore specified by way of security for the ultimate payment of the said debts and interest as aforesaid out of the proceeds of said policies, whenever said policies shall have become claims, and the petitioner shall, by such deed, covenant to pay or provide for the payment of all moneys necessary to pay the interest on the said debts at the rate and in the manner aforesaid, and also all moneys which may be necessary to keep all said policies in being, and also all moneys necessary to discharge the interest payable to the existing fully secured incumbrancers on the said policies, and shall also enter into a separate

covenant with each creditor for the performance of these several obligations, and for the payment of the debt due to each creditor, with interest at the rate aforesaid, from the date of the filing of the said petition, out of the proceeds of said policies, when the same shall have become claims, and such deed shall provide for the payment to the said trustee of the required money for the payment of the premiums on said policies and interest annually to the creditors as aforesaid, and for the distribution of such interest by such trustee annually forthwith upon receipt thereof, the first payment of interest to the creditors to be made on or before the 1st June, 1901, and the subsequent payments at intervals of twelve months thereafter, and shall also, for the protection of the creditors, contain a provision releasing the creditors from this arrangement in the event of any default by the petitioner in providing for the several payments hereinbefore specified, and entitling each of them forthwith to sue the petitioner for such sum as may be then due and owing from the petitioner to them individually upon foot of their said respective debts, and shall also contain such other provisions as counsel for the trustee may deem it necessary or advisable to insert therein for the effectuating of this scheme of arrangement, or for protecting the rights of the creditors in accordance with the premises. Upon the execution of said deed the petitioner shall be entitled to a certificate pursuant to sect. 64 of the Bankruptcy (Ireland) Amendment Act, 1872."

The requisite majority of the creditors assented to the proposal, but by order dated 10th July, 1900, Boyd, J., made no rule, and refused to pass the first sitting, on the ground that the Court had no control over the matter unless the equity of redemption in the policies was vested in the official assignee. From that order the arranging debtor appealed.

O'Brien, Q.C., and *R. W. Littledale*, for the appellant.

The question is:—Is the proposal "reasonable and proper" within the meaning of sect. 353 of the Bankruptcy Act of 1857? The Court held that it was not, unless the equity of redemption in the policies was vested in the assignees. We deny the right of the Court to hold the proposal not to be "reasonable and proper," unless this condition was complied with. Sect. 349 of

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the Act of 1857 is not mandatory; it only requires the property to vest in the official assignees, if such shall be required by virtue of such resolution.

In the event of this Court holding that vesting in the assignees in this case is not essential, the petitioner will apply to amend the proposal by adding a covenant by his wife to pay the premiums on the policies and the interest on the debts, and also to modify the last clause in the proposal relating to the certificate.

A. F. Blood, Q.C., for the creditors, supported the appellant.

Ronan, Q.C., and *R. Doyle*, for the official assignees :—

The proposal in the present case amounts merely to a promise by the arranging debtor, and there is no security offered, nor any property vested, to ensure the carrying out of the proposal. The debtor may arrange with his creditors out of Court if he is able; but if he proposes to employ the statutable machinery, the Court must have control over the arrangement. The basis upon which the arrangement clauses of the Bankruptcy Act of 1857 are founded is that the arrangement must be under the control of the Court. By sect. 344 the Court may, if it think fit, after granting a protection order, direct that the estate shall be taken possession of by the official assignees, or by the Court messenger, and all stock, moneys, and effects are to be paid into the Bank of Ireland to the credit of the official assignees. Section 345 directs an account to be filed by the debtor of his estate and of his debts, ten days before the private sitting, a copy of which is to be given to the official assignees. The first and second sittings are governed by sects. 346 and 347, subject to confirmation, and by sect. 353 the Court may adjudicate the debtor bankrupt if, *inter alia*, the proposal is not reasonable and proper. Sect. 349 provides for vesting the estate in the official assignees, if the terms of the proposal require it. The entire proceeding must be under the control of the Court, and if it is not, it is open to the Court to hold that that is not a reasonable and proper proposal.

[They referred to *Staniar, Roberts, & Co.* (1).]

(1) 20 Q. B. D. 544.

FITZ GIBBON, L. J. :—

We do not require to hear counsel for the appellants in reply, understanding, as we do, that it is conceded that the clauses of the proposal leaving the settlement of the deed to counsel without reference to the Court, and providing that the certificate of conformity is to be given to the debtor on the execution of the deed, as distinguished from the carrying out of the arrangement, cannot be sustained.

This case is peculiar, both in its facts, and in the way in which it comes before us. Very few people in the position of the present debtor can have ever thought of carrying an arrangement with their creditors, and I know of no case in which a proposal for arrangement was presented in such a rudimentary form. Moreover, the case is not in a condition convenient for counsel to deal with, for Mr. O'Brien was prepared to modify the proposal, while Mr. Ronan, in supporting the order of Boyd, J., insisted on dealing with it as it stands. But it seems to be conceded that Boyd, J., as a matter of principle, laid down that he would not approve of any proposal which did not vest in the assignees the debtor's interest in the policies of insurance on his own life, and, in order to make it possible to proceed, we are prepared to express our opinion upon this point, though we agree that the proposal can not be carried as it stands.

The debtor's interest in the policies is the only property which seems likely ever to be of any value for the purpose of paying his debts, but at present it is only a burden. Mr. Ronan contended that under the Bankruptcy Act, 1857, section 349, no arrangement can be carried out unless the equity of redemption in the policies is vested in the assignees. The debtor's wife makes it a condition of assisting him, that this vesting shall not take place. In my opinion section 349 does not affirmatively enact that there shall be vesting in every case, but only that, where a vesting is required to take place by the terms of the resolution, it shall be a vesting in the official assignees, or in a trustee jointly with them. Though I can conceive many cases where all property in the hands of the arranging debtor ought to be thus vested, and though even in the present case it may be right that the chattels and anything else which the

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debtor has should so vest, in order to provide a fund for expenses or the like, it is in my opinion quite reasonable, and consistent with the Act, that property such as the interest in these policies should not be vested with the possible result of making the money, if it falls in, liable to poundage or fees. Therefore, I hold that the proposal ought not to be rejected merely because this property is not to vest.

That difficulty being out of the case, we must consider what the proposal is. The property which alone can pay the debts consists of the equity of redemption in policies on the debtor's life, amounting to over £163,000, which are subject to heavy incumbrances. The proposal, on the face of it, is only a promise—a proposal—by the debtor to give his own covenant to pay £4 per cent. on the debts and the premiums on the policies, offering no security whatever for the carrying out of the arrangement, and proposing to vest the equity of redemption in the policies in a trustee of his own choosing. I have no hesitation in saying that the Court should not sanction such a proposal, for the simple reason that it is merely a promise by the debtor which he has no means of performing. It is admitted that the means are to be provided by a third party, but the proposal contains nothing to bind that third party.

The clause providing that upon the execution of the deed the debtor shall be entitled to a certificate pursuant to the Bankruptcy Act, 1872, section 64, is also objectionable, and inconsistent with the Act. The certificate under section 64 has the same effect as a certificate of conformity in bankruptcy, and it is not to be granted until the creditors have been "satisfied." In this case, satisfaction, if it ever comes, will come from the payment of the debts out of the insurances, after the debtor is dead.

For these reasons, though we think that we ought to give an opportunity to the arranging debtor to modify his proposal, it must be modified. Under the statute the proper opportunity for modification is at the first sitting or an adjournment thereof. The substance of this whole business is the proposal that a third party, the debtor's wife, shall give some security for carring it out. The present proposal only says that this is to be effectuated by a deed containing such provisions as counsel for the trustees may

deem it necessary or advisable to insert. We do not accept this as sufficient. The Court ought to have an opportunity of seeing what these provisions are, and of seeing that something substantial is secured from the outside source to pay the premiums on the policies. Payment for a year or two only would be useless, if the payments were then to cease, because the surrender value of the policies would never reach the unsecured creditors. But if Mr. O'Brien is able to bring forward a definite proposal to provide outside money to pay the interest for a reasonable time, with a provision for keeping up the policies until they fall in, it might be most beneficial to carry out such a proposal, even though nothing was vested in the assignees. I say distinctly that no universal rule as to vesting property in the official assignees ought to be allowed to prevent such an arrangement. Here it would amount to a condition that a third party, who is willing to keep up the policies and to pay interest on the unsecured debts, should be forced to vest the property in the official assignees. That person might reasonably say, "I am willing to pay the interest and the premiums, but I refuse to allow the insurance money which is obtained at my expense to be subjected to costs, fees, and charges in bankruptcy." Mr. Ronan and Mr. Doyle contended that we should not allow the Court of Bankruptcy to be ousted from control of the money; they further called on us to say that such a proposal as this ought to be left to the creditors to carry out among themselves without the sanction of the Court. The duty of the Court is to see whether the proposal supported by the requisite majority is reasonable and proper, but while protecting the minority from anything wrong or unfair, it ought not to withhold its sanction where the effect of doing so must be either to prevent any arrangement, or to put it into the power of one or more individual creditors to make unfair conditions for themselves.

The outside party who is providing the money says—"When the policies fall in, I want to have the amount distributed by a trustee and not by the Official Assignees;" he is entitled to say, also—"If you won't agree to this I won't help you at all," and in my opinion such a condition is not necessarily unreasonable.

The only possible mode of advancing the common object of the debtor, of his wife, and of all the creditors, is to discharge the order

Appeal. 1900. *In re* M. Fitz Gibbon, L.J.

which made "No Rule" on the proposal at the first sitting. Its effect was to put an end to the proposal altogether, because, except at the first sitting or an adjournment thereof, the proposal could not be modified. It also put an end to the order for protection. If the "No Rule" stands, a new petition and a new proposal will be necessary, and, in the meantime, any one creditor can throw the case into bankruptcy. Speaking for myself, I think that when the Court came to the conclusion that the proposal was not reasonable or proper, "No Rule" was not the right form of order; either the petition should have been dismissed, or the first sitting should have been adjourned to enable a modified proposal to be brought forward. We grant the adjournment, because we are assured that it is intended to bring forward a modified proposal, no creditor objects, and it is for the interest of all that such a proposal should be made, and if possible carried out. But the business must be brought to a point. The adjournment will be to a day after the 1st September next to be appointed by the Court, with liberty to the petitioner, on or before the 31st August, to lodge with the official assignees such modification of the proposal as he may be advised to submit for the consideration of the Court, with a draft of the deed proposed to be executed for effectuating the arrangement, and a statement of the particulars of the provision proposed to be made for the payment of the interest on the debts and the up-keep of the policies of insurance in the proposal mentioned, with liberty to all parties to apply to the Court to appoint a day for the adjourned sitting, and to proceed in the matter as occasion may require, and we will extend the protection until the adjourned sitting.

While it is, in our opinion, within the jurisdiction of the Court to deal with the equity of redemption in these policies without vesting it in the official assignee, it is, on the other hand, our opinion that no modification will be reasonable, unless two conditions are fulfilled:—1st, Unless it postpones the certificate until the debts are satisfied; and, 2nd, unless it shows a reasonable ground of expectation that substantial property will be made available, out of which the interest and premiums will be paid until the policies fall in and become applicable to pay the debts.

Appeal.
1900.
In re M.

HOLMES, L.J.:—

The proposal made by the debtor at the first private sitting was such as could not be approved of by the Judge. That the debtor should be entitled to his certificate on the execution by him of a deed containing a series of stipulations on his part which he had no means of carrying out was so manifestly unreasonable as to justify the Judge in putting a summary end to the arrangement proceedings, unless the proposal was substantially altered or modified, and it does not appear that any reasonable modification was suggested. Under these circumstances I should be in favour of simply affirming the order of Mr. Justice Boyd, were it not that I am led to think that another and satisfactory proposal would have been brought forward, were it not for an erroneous view of the law taken by the learned Judge on one matter of importance in the present case. Mr. Justice Boyd is stated to have expressed the opinion that he had no jurisdiction to approve of a proposal to vest any part of the property of the arranging debtor in any other person than an official assignee of the Court, with or without a co-trustee. Now as a general rule of practice, I wholly approve of keeping the property of the debtor under the control of an officer of the Court, and in most instances, if there is to be a vesting of the debtor's property, the official assignee is the proper trustee. But I see nothing in the statute that prohibits the Judge from approving of a proposal, one of the terms of which is that the whole or part of the debtor's property should be transferred to a non-official trustee.

The present is, I think, an exceptional case in which this might be done with much advantage to all the creditors. The only asset of the debtor that is likely to be of any value is his equity of redemption in policies of assurance on his own life; and this asset is at present worthless, as there are no means of providing for payment of the premiums. We are told, however, that the debtor's wife, who possesses independent property, is willing not only to secure the payment of the premiums, provided the policies are vested in a trustee of her own choice, but also to pay interest at the rate of four per cent. per annum on the debts till the policies fall in, and it is, I think, evident that this would be a most advantageous arrangement for the creditors. It may

Appeal. 1900. *In re* M. Holmes, L.J.

be said that the lady ought to have no objection to the policies being vested in the official assignee; but she positively declines to provide for the payment of the premiums and the interest on such terms. Her reason is that she wishes to avoid the payment of the commission which the assignee would be entitled to receive on the proceeds of the policies; and her position in this respect is quite intelligible; nor do I see any objection to it, provided that she adequately secures either by her personal covenant, or by a charge on property of value, the payments which it is stated she is prepared to make.

I think that the debtor ought to have an opportunity of bringing forward an amended proposal of this character; and the best mode of giving him such an opportunity is to set aside the order appealed from and to adjourn the first sitting, so as to enable a new proposal to be made.

Solicitors for the appellant: *J. & L. Scallan & Co.*
Solicitors for the creditors: *J. & L. Scallan & Co.*
Solicitors for the Official Assignees: *Bennett Thompson, & M'Laughlin.*

R. D. M.

SMYTH *v.* REID (1).

Q. B. Div. 1900. June 7, 14.

Landlord and tenant—Land Law (Ireland) Act, 1881, *sections* 2, 5—"*Sub-division*"—"*Sub-division by the tenant*"—"*Conjunct tenant*"—*Effect of assignment* (*without notice to the landlord*) *of his divided share by one of two or more tenants in common of a present tenancy.*

Prior to 1881, A, B, and C were tenants from year to year of a farm of some 21 acres, each of them holding about 7 acres in severalty, and being severally rated in respect of their shares, and each contributing one-third of the rent, which was paid from time to time to the landlord in one sum, and receipts given in the joint names of the three tenants by the landlord, who was aware of the sub-division. In December, 1881, a fair rent was fixed on the farm by originating agreement and declaration entered into between the landlord and A, B, and C. In 1894 C mortgaged his 7 acres to the plaintiff, without notice to or consent of the landlord. C died, and the plaintiff brought a civil bill ejectment on the title, founded on his mortgage, against the defendants, C's representatives. On case stated by the Judge of Assize:—

Held, that the assignment of 1894 was not a "sub-division" of the holding within the 5th section of the Land Law (Ireland) Act, 1881.

Quære—If a "sub-division" within section 5, would such an assignment by C be a sub-division by "the tenant" within the meaning of that section?

CASE STATED by Gibson, J., upon the hearing before him at the Spring Assizes, 1900, for county Antrim, of an appeal from a civil-bill ejectment decree on title.

Prior to the passing of the Land Law (Ireland) Act, 1881, William Reid, William John Reid, and James Reid, were tenants from year to year of a farm of land containing about 21 acres in the county of Antrim. Each of them held about 7 acres in severalty, and occupied a house on his own portion, and the landlord was aware that the farm was so held. Each of them was rated separately for the portion occupied by him and contributed one-third of the rent of the whole farm, which was paid in one sum to the landlord, and the receipt was given by the landlord in the joint names of the three tenants for the whole rent.

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In December, 1881, an originating agreement and declaration under the Land Act of 1881, was entered into between the landlord and William Reid, William John Reid, and James Reid (the tenants), whereby £16 was fixed as the fair rent of the whole holding, the area being therein stated as 21 acres and 5 perches.

By deed of mortgage dated 20th January, 1894, William Reid assigned to Thomas Smyth (the plaintiff) the portion of the said farm occupied by him, describing it as "all that farm of land in the townland of G., containing 7 acres statute measure, or thereabouts, and held under General Dyott, and others, at the yearly rent of £5 6*s.* 8*d.* to secure £63 and interest." No notice of this mortgage was served on the landlord, nor was his consent obtained.

William Reid subsequently died, and the defendants, his children, were in occupation of his farm.

The plaintiff, Thomas Smyth, as mortgagee, brought the present civil-bill ejectment on title against the defendants to recover the premises included in the mortgage to him, and a decree had been granted by the County Court Judge.

Mr. Justice Gibson stated that, so far as regarded the statutory prohibition against sub-division, there was no distinction between a mortgage and sale, and that if a sale of part was permissible, a serious question would arise as to the landlord's rights under section 1 of the Act of 1881; that, on the other hand, though the holding was, as regarded the landlord, an integer, the mortgage was only a dealing of the tenant with his separate part held by him as against his co-tenants in severalty without active objection on the part of the landlord—that as a question of some general importance was raised, which did not appear to be covered by any precise authority, he had, at the request of counsel on each side, consented to state a case; that his own opinion had fluctuated during and since the assizes, and he had not thought it necessary to arrive at or express any opinion between the common sense view represented by the plaintiff and the technical difficulties suggested on behalf of the defendants.

The question submitted for the opinion of the Court was whether the decree should be affirmed or reversed.

M'Ilroy and *M'Cutcheon*, for the plaintiff.

R. F. Todd, for the defendant.

[Counsel cited *Ireland* v. *Landy* (1); *Fogarty* v. *Shanahan* (2); *Murtagh* v. *Allen* (3); *Gethings* v. *Riversdale* (4). Land Law (Ireland) Act, 1881, ss. 2, 5, 21; Land Law (Ireland) Act, 1896, s. 19].

Cur. adv. vult.

June 14.

PALLES, C.B. :—

This is a case stated for our opinion by Mr. Justice Gibson on the hearing of a civil-bill appeal. The question reserved was whether the decree for possession granted in the Civil Bill Court should be affirmed or reversed. The process in the Civil Bill Court was an ejectment on the title by mortgagee against mortgagor to recover possession of part of a holding under a judicial tenancy.

The only defence was that the mortgage was a subdivision by the tenant of the holding contrary to section 5 of the Land Act of 1881, and therefore void in law. Thus, the question for us is, was it such a subdivision?

This question may be divided into two; 1st, was it a subdivision? 2nd, if so, was such subdivision by the tenant?

An answer in the negative to either of these questions will decide the case, without any determination of the other.

I regard the second question I have mentioned, *i.e.* the effect that as regards such a matter is to be given to the word "tenant" in that section as one of great importance, of general application, and of considerable difficulty. Suppose that what has taken place here were in law a subdivision, would it be a subdivision by the tenant within the meaning of sect. 5? I mention this because if we hold that the act of one of three persons who together constitute the tenant, is an act of "the tenant" within the meaning of the section, the result would be that the entire of a holding held by the three persons as one conjunct tenant would be forfeited by the act of one against the will of the others. I believe all of us desire to

(1) 22 L. R. Ir. 403, 424.
(2) [1896] 2 Ir. R. 273, 286.
(3) 27 L. R. Ir. 118.
(4) 33 Ir. L. T. R. 3.

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be understood as not expressing any opinion whatsoever upon that question. It is far too important for us to express an opinion upon in a case in which it is not necessary to do so.

I base my judgment upon my determination of the first question, whether this act was a subdivision within the meaning of the sub-section. Was the mortgage a subdivision? It is admitted that it would not be, if an absolute sale and assignment of the part of lands included in it would not be a subdivision, and I prefer to determine the matter as if this instrument had been an absolute assignment and not a mortgage.

The facts are few, and are thus stated by Mr. Justice Gibson.

"Prior to the passing of the Land Law (Ireland) Act, 1881, William Reid, William John Reid, and James Reid, were tenants from year to year of a farm of land containing about 21 acres, situate in the townland of Gortaheron, in the county of Antrim, under Richard Dyott. Each of them held about 7 acres in severalty, and occupied a house on his own portion, and the landlord was aware that the land was so held. Each tenant was rated separately for the portion of the farm occupied by him, and contributed one-third of the rent of the whole farm, which was paid in one sum to the landlord, and the receipt was given by the landlord in the joint names of the three tenants for the whole rent. "On the 21st day of December, 1881, an originating agreement and declaration under the said Act was entered into, in which Richard Dyott was landlord, and William Reid, William John Reid, and James Reid, were tenants, whereby £16 was fixed as the fair rent of the whole holding, the area of which was stated to be 21 acres and 5 perches."

That is there was but one holding; but the legal estate in that holding became vested as to one part in one person, and as to two other separate parts in two other persons.

The mortgage under which the plaintiff claims is dated the 20th January, 1894, and by it William Reid assigned his 7A. to the plaintiff to secure £63. In *Ireland* v. *Landy* (1) the legal character of such a tenancy and of the "tenant" thereof was elaborately discussed in the former Court of Exchequer and in the Appeal Court, and was finally determined by the latter. It was there held that persons situate as were William Reid, William John Reid, and James Reid, together constituted a "tenant" within the meaning of the Act of 1881, and that although such

(1) 22 L. R. Ir. 403, 424.

"tenant" involved a plurality of persons, they were not, by reason of such plurality, disentitled to have a fair rent fixed under that Act. The effect of that decision is that a subdivision of a holding which, as that here, took place before the 22nd August, 1881, the date of the passing of the Land Act, does not disentitle the persons, who together constituted the "tenant," from having a fair rent fixed if they are otherwise entitled.

When the rent was fixed in the present case, the three persons who between them constituted the tenant became subject to an obligation not to subdivide the holding without the consent of the landlord in writing. But the holding which was the subject of this obligation had been, theretofore, lawfully subdivided into three parts, and the mortgage made by William to the plaintiff did not in anywise further subdivide it. The subdivision had already taken place—each separate divided part of the farm had became an integer as regards title, and after that assignment it continued to be the same entire integer as it had been before the assignment. No one of the three separate parts was subdivided. The holding was not divided into parts different from those separate parts of which it previously consisted. Therefore the holding was not subdivided at all by the assignment. That assignment did no more than transfer the title in the entire of one of these previously existing parts from the person in whom it was then vested to another.

Upon the short ground, then, that the only subdivision proved was one that took place, not since the Land Act, when it would have been unlawful, but before that Act, when it was lawful, I am of opinion that that subdivision was not one contrary to either sect. 2 or sect. 5 of the Act, and that, therefore, the deed from Reid to the plaintiff, whether it be treated as an absolute assignment or as a mortgage, is unimpeachable under either of these sections. It is unnecessary, and I think it would be improper, to discuss here the question whether, had this been an absolute sale, the landlord would have been entitled to a right of pre-emption of the part sold. Where one person is tenant of a holding, an assignment by him of the entire to a stranger without the landlord's consent, and without giving such landlord an opportunity of availing himself of his right of pre-emption, is voidable only,

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not void; consequently, as there has not been any attempt by Mr. Dyott to avoid it, the assignment, had it been of the whole, should be treated as valid. So too should the assignment of part, which, although of part only, is not a subdivision. Even then, if the landlord were entitled to a right of pre-emption as to the part sold, the fact that he was not afforded an opportunity of exercising his right, will not disentitle the plaintiff to recover.

Many matters were suggested to induce us to hold that a decision in favour of the plaintiff might deprive landlords of holdings, held under circumstances similar to those in the present case, of rights intended to be given to them under the Act of 1881.

As to these arguments I can only say that I think the Legislature, when passing this Act of 1881, had not present to its mind many of the complications which should necessarily arise in relation to tenancies of which the "tenant" consisted of a plurality of persons.

It might possibly have been a reasonable provision in an Act such as the Land Act, which prohibited future subdivision of one entire holding, without consent, to have made it a condition precedent to a tenant becoming entitled to the great benefits of fixity of tenure, fair rent, and free sale thereby provided, that he should first acquire the entire interest in the tenancy, but it has been once and for all determined, in *Ireland* v. *Landy* (1), that the Act has not done that. Lord Ashbourne in that case considered the absence of a provision in the 21st section as to the effect of subdivision before the Act, upon the right of a tenant under an expired lease was a *casus omissus* in the Act; so equally I hold to be a *casus omissus*, the total omission from the Act of any provision directed to preventing the future alienation of one divided part to persons other than the owners of the other parts. Even were there any doubt upon the question—and in my opinion there is none—I should hold myself bound to construe the various provisions in the Land Act, which prohibit assignment, subdivision, and subletting, and incorporate provisions to that effect by implication in future tenancies, as if they were clauses in an agreement *inter partes*, and the law has been well settled that in the construction of such clauses in agreements

(1) 22 L. R. Ir. 403, 424.

inter partes, you are not at liberty to extend the operation of the very words, unless there be some necessary implication arising from the entire instrument of such a character as to be equivalent in indicating intention to express words. I find nothing of that description in this Act. The question reserved must be answered in the affirmative, and the decree appealed from affirmed, with costs.

ANDREWS, MADDEN, and BOYD, JJ., concurred.

Solicitor for the plaintiff : *M'Caughey*.
Solicitor for he tdefendant : *Currie*.

A. E. R. J.

THE ATTORNEY-GENERAL *v.* REV. CANON JOHN JOSEPH ROBINSON AND ANNIE HENRIETTA ROBINSON (1).

Revenue—Finance Act, 1894, *ss.* 1, 2, *sub-s.* (d); *s.* 7, *sub-s.* 5—*Estate duty—Agricultural property—Principal value—Land in the occupation of a tenant—Policies of insurance—No part of the premiums paid by the deceased—Property passing at the death.*

In estimating, for the purpose of Estate Duty, the principal value of agricultural land in the occupation of a tenant, where no part of such principal value is due to the expectation of an increased income, the proviso to section 7, sub-section 5, of the Finance Act, 1894, applies, and the tenant is entitled to have the principal value limited, as therein provided, to "25 times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed under that assessment, and are allowed under the Succession Duty Act, 1853, and, making a deduction for expenses of management, not exceeding 5 per cent. of the annual value so assessed."

R., upon the occasion of his marriage in 1843, assigned four policies of insurance, and his wife assigned a sum of £3500, to trustees. Under the provisions of the settlement the policies were kept up, and the annual premiums paid, exclusively out of the income of the moneys of the wife, until the death of R. in 1898, when the moneys secured by the policies became payable :—

Held, that the moneys payable under the policies were liable to Estate Duty

(1) Before PALLES, C.B., and JOHNSON and BOYD, JJ.

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under section 2, sub-section (*d*), of the Finance Act, as being an "interest purchased or provided by the deceased, either by himself alone, or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased," and therefore property "deemed to pass" within the meaning of the section.

THIS case came before the Court by information on the Revenue side.

John Robinson, late of Uplands, Delgany, in the county of Wicklow, died on the 17th December, 1898, having made his will, dated the 30th September, 1897, whereby he appointed the defendants his executors.

In the Inland Revenue affidavit leading to the grant of probate to the defendants, the lands of Blainroe were included in the return of his property coming within section 1 of the Finance Act, 1894 (57 & 58 Vict. cap. 30). The lands were described as "part of the lands of Blainroe, containing 166⅔ acres Irish plantation measure, in the barony of Arklow, and county of Wicklow, held under lease dated the 15th of October, 1874, from Lord Fitzwilliam to William Newland, for thirty-one years, from the 25th of March, 1874, subject to the yearly rent of £207, reduced by order of the Irish Land Commission, dated the 13th of June, 1891, to a judicial rent of £170. For the purposes of assessment of Estate Duty under sect. 1, in respect of the lands of Blainroe, the defendants estimated the principal value as follows:—

Tenement valuation, £180 15*s.*							
Principal value (gross), pursuant to Finance Act, 1894, sect. 7, sub-sect. 5, £180 15*s.* × 25, ...						£4519	0 0
Less twenty-five years purchase of headrent, £170 × 25, .						£4250	0 0
Like of management expenses (5 per cent. on £180 = £9), £9 × 25, ...						225	0 0
Average poor rate on £10 at 2*s.*, .	£1	0	0				
Like county cess at 3*s.*, . . .	1	10	0				
	£2	10	0	×	25 =	62	0 0
						£4537	0 0

In this estimate of the principal value the defendants treated the lands of Blainroe as coming within the proviso of section 7, sub-section 5 of the Finance Act, 1894, as being "agricultural property where no part of the principal value is due to the expectation of an increased income from such property," and therefore entitled to have the principal value limited to "twenty-five times the annual value as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for the expenses of management not exceeding 5 per cent. of the annual value so assessed." Upon the basis of their calculation under the proviso, the defendants claimed that the net principal value of the lands of Blainroe, for the purposes of Estate Duty, was of no assessable value, and that no Estate Duty was payable in respect of these lands. The informant submitted that the defendants were not entitled to make these deductions upon the ground that the proviso of section 7, sub-section 5, of the Act had no application to land *in the occupation* of the deceased, and that the principal value was ascertainable only as prescribed in section 7, sub-section 5, by the price which, in the opinion of the Commissioners, the property would fetch in the open market, without any deductions under the proviso.

Prior to, and upon the occasion of the marriage of the deceased with Isabella Robinson in 1843, the deceased was possessed of four policies of insurance on his life for the respective sums of £1000, £500, £500, and £500, and the intended wife was possessed of a fortune of £3500. By a deed executed on the marriage, dated the 8th June, 1843, the four policies of the deceased, and the wife's fortune of £3500, were assigned to trustees upon trust as to the moneys secured by the policies (when received) to pay the income thereof to the intended wife for life, and after her death as to the principal moneys for the children of the marriage, and upon trust as to the wife's fortune of £3500, to apply, after the marriage, so much of the income thereof as might be necessary to pay the premiums on the four policies of insurance, and to pay the residue to the deceased for life, and after his death to the wife for life, and after the death of the survivor, in trust for the children of the marriage. From the date of the marriage the

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policies of insurance were kept up as provided in the deed out of the wife's moneys exclusively. Isabella Robinson predeceased her husband, and the husband by his will appointed the moneys which should become payable on the policies in the following manner:— As to £500, to his son, Henry L. Robinson, and the balance in equal shares to his son, the Rev. Canon John Joseph Robinson, one of the defendants, and his daughter, Mary Isabella Ovenden. The trustees appointed by the deed to carry out the trusts of the settlement being dead, the defendants on the death of John Robinson, undertook the collection and distribution of the policy moneys, and the liability for Estate Duty (if any) payable thereon. The information claimed that Estate Duty was payable in respect of the policy moneys, as settled property, passing on the death of the deceased within the meaning of section 1 of the Finance Act, 1894 (57 & 58 Vict. c. 30). In the argument, however the claim of the informant was rested mainly upon the contention that the policy moneys were property which should be "deemed to pass" upon the death of the deceased under section 2, sub-section (*d*) of the Act as being "any annuity or other interest purchased or provided by the deceased either by himself alone, or in concert, or by arrangement with, any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." The defendants contended that no Estate Duty was payable in respect of the policy moneys either under section 1 or section 2, and it was pointed out in their answer that no life estate was reserved to the deceased in any of the four policies, and that he was not in any way liable for keeping up any of the policies, and did not covenant to pay the annual premiums thereon. Further, that as the deceased had parted absolutely with all his interest in the policies of insurance on the 8th June, 1843, and as he had, at the time of his death, no general power of disposition over them, the policies were not property which passed on the death of the deceased, under section 1, or which should be "deemed to pass" under section 2 of the Finance Act, 1894.

The Solicitor-General (*Wright, Q.C.*) (with him *Ronan, Q.C.*, and *Charles Mac Dermot*), for the informant:—

By sect. 1 of the Finance Act (57 & 58 Vict. c. 30), Estate Duty is payable upon the principal value of all property passing on the death, to be ascertained in the manner provided. The section, which mainly prescribes the way in which the value is to be ascertained is sect. 7 of the Act and by sub-sect. 5 of that section:—"The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased: provided that, in the case of any agricultural property, where no part of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding five per cent. of the annual value so assessed." The proviso in the sub-section does not apply at all to cases like the present. The expression "expenses of management" cannot be applied to the case of a man who is managing his own farm. It relates rather to estate agent's fees and matters of that description. Again, the expression, "where no part of the principal value is due to the expectation of an increased income from such property" refers only to cases where leases can fall in, and has no reference to the case of an agricultural holding in the occupation of a tenant. The reference to Schedule A of the Income Tax Acts points to the same conclusion. Schedule A of the Income Tax Acts deals with taxes in respect of "the property in all lands, tenements, and hereditaments," and Schedule B, with those in respect of "the occupation of all such lands, tenements, and hereditaments." If this proviso is to apply to every agricultural holding under a judicial tenancy, it is curious that it should be so worded as to refer only to Schedule A, viz. that which deals with the *property* in all lands, &c., as distinguished from the *occupation*. The proviso is confined to persons who would pay income tax under Schedule A, as provided by 16 & 17 Vict. c. 34, s. 13. The deductions under the Succession Duty

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Act, 1853, are dealt with in sect. 22 of that Act, which is as follows: —"In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rentcharges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings"; upon this question I refer to *The Attorney-General* v. *The Earl of Sefton* (1). The defendants are not entitled to deductions in respect of either poor-rate or county cess. The Income Tax Act (16 & 17 Vict. c. 34), by sect. 13, provides that income tax shall be assessed by a poundage rate upon the annual value of the lands, according to the Poor Law Valuation; and the Irish Valuation Act (15 & 16 Vict. c. 63), by sect. 11, provides that the valuation "in regard to land shall be made upon an estimate of the net annual value thereof, with reference to the average prices of the several articles of agricultural produce hereinafter specified, all peculiar local circumstances in each case being taken into consideration, and all rates, taxes, and public charges, if any (except tithe rentcharge), being paid by the tenant." The valuation is, therefore, the net annual value, on the assumption that all rates, taxes, and other charges are paid by the tenant, including poor-rate and county cess. The figure ultimately arrived at is after giving credit for poor-rate and county cess, and the tenant is not entitled here to any credit for them.

Upon the second branch of the case, viz. that which deals with the policies of insurance, I refer to the cases of *The Lord Advocate* v. *Fleming* (2) and *Earl Cowley* v. *The Commissioners of Inland Revenue* (3), and more especially to the observations of Lord Macnaghten in the latter case at pp. 212 and 213.

Section 2 of the Finance Act deals with property which shall be deemed to pass, including in sub-sect. (*c*) "property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted, and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily,' and a reference to a 'volunteer' were omitted

(1) 11 H. L. Cas. 257. (2) [1897] A. C. 145. (3) [1899] A. C. 198.

therefrom." And in sub-sect. (*d*) :—"Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Sect. 11 of the Customs and Inland Revenue Act, 1889, referred to in sub-sect. (*c*) renders liable to duty a policy of insurance effected by any person "where the policy is kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money, in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The policies in this case come under sub-sect. (*d*). *The Attorney-General* v. *Dobree* (1). See the arguments of Haldane, Q.C., and Danckwerts at p. 446. Darling, J., at p. 449, and Channel, J., at pp. 452, 453. They constituted a taxable beneficial interest under that sub-sect., brought into existence under a contract of marriage settlement upon the death of the deceased, and consequently liable to estate duty.

Matheson, Q.C., and *Brunskill*, for the defendants :—

The definition of agricultural property includes "the mansion-house, together with the lands occupied therewith," so that it must apply to the case of demesne lands occupied with the mansion-house. There is nothing relating to tenure in the definition, and nothing to exclude land in hands. The argument that it relates only to lands held in fee is based upon the reference to Schedule A of the Income Tax Acts. What is assessed under Schedule A is the value and not the incidence of taxation. There is nothing to prevent its applying to all classes of lands, whether in fee or however held. In dealing with "expenses of management," too, you must go back to the definition of agricultural land, and allow expenses of management in all denominations under that definition. The idea of management suggests the actual farming of

(1) [1900] 1 Q. B. 442.

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the land as distinguished from the collection of the rents. It is the perfectly well-recognised distinction between manager and receiver. Grass lands and a home farm connected with an estate are very seldom under the agent of the estate. They are generally in charge of a steward.

In the correspondence between the department and the defendants and also in the information, the duty in respect of the moneys payable under the policies was claimed under sect. 1 of the Finance Act, 1894, as property passing upon the death. In consequence of the recent decision in the case of *The Attorney-General* v. *Dobree* (1), which was published in the March number of this year, the argument of the Solicitor-General was based partly upon the lines of the judgments in that case. In 1843 these policies were absolutely assigned by the deceased. These *choses in action* were kept up, not by him, but out of the trust moneys, and could at any time have been turned into money by the trustees. Upon the death of the deceased the money became payable, and it cannot be contended that the change in the nature of the property from the security for the debt into the very debt itself could be held to be "a passing upon the death." That question is absolutely settled in *The Lord Advocate* v. *Fleming* (2). It is plain from *The Attorney-General* v. *Beech* (3) that it is the passing of the estate that is to decide the question, and not change in the character of the property. The words of Lords Halsbury and Watson dispose of the case as put in the information that there was here "a passing upon the death" under section 1 of the Finance Act, 1894. The decision in *The Attorney-General* v. *De Préville* (4) was reversed in the Court of Appeal (5), which brings it upon a level with *The Attorney-General* v. *Beech* (3), and makes it no authority one way or the other in this case. Section 11 of the Act of 1889 expressly deals with policies of insurance "effected by any person dying on or after the 1st June, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion

(1) [1900] 1 Q. B. 442.
(2) [1897] A. C. 145.
(3) [1899] A. C. 53.
(4) [1899] 2 Q. B. 238.
(5) [1900] 1 Q. B. 223.

to the premiums paid by him, where the policy is partially kept up by him for such benefit." That impliedly excludes from duty a case where the settlor has not kept up any of the premiums.

Where you find a section dealing expressly with the case of policies of insurance, and that section says that they shall be liable to duty if the premiums have been paid wholly or partially, it is legitimate to argue that a case where the premiums have not been paid at all by the settlor is not included. Upon *The Lord Advocate* v. *Fleming* (1) the proposition may be based that where a man entered into a contract with an insurance company to pay a sum of money to his assigns after his death, he is the person who "provides"; no interest accrued or arose upon the death of the deceased here. If the effect of sub-section (*d*) is that where a man has not kept up any of the premiums but simply has made a settlement fifty years ago, it is to make these policies liable to duty, sub-section (*c*) is rendered useless and unnecessary. The mere fact that a man insures his life and assigns the policies by deed for value to another person, who keeps up the premiums, does not make him at the time of his death the person who has purchased or provided. If these policies are within sub-section (*d*) there must be an apportionment, because sub-section (*c*) enacts that when the policies have been partially kept up by the deceased his estate is only liable in proportion. Why should a man's estate be liable to only portion of the duty on a policy of insurance which is kept up by him partially for the benefit of the donee, and be liable to the whole of the duty in a case where it was not kept up by him at all? Soward on Estate Duty at page 38 deals with sub-section (*d*) in a way that has a great deal to be said in its favour. The line adopted is entirely in accord with the decision in *The Attorney-General* v. *Dobree* (2), and brings sub-section (*d*) into harmony with sub-section (*c*). It says that the bounty should flow from the deceased himself, and therefore Estate Duty is payable on the beneficial interest accruing or arising on the death of the deceased through what is provided by the deceased. What starts the liability to taxation is "an annuity or other interest purchased or provided by the deceased." In this way you bring

(1) [1897] A. C. 145. (2) [1900] 1 Q. B. 442.

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sub-section (*d*) into consonance with sub-section (*c*) which remains untouched and in full effect, and avoids the absurdity of a man being liable in the one case to half the tax and in the other case to the whole tax.

Ronan, Q.C., in reply:—

The first thing that strikes one is, that the calculation prescribed in sub-section 5, is confined to Schedule A, which is essentially applicable to a man out of possession. "Expenses of management" is an ordinary English expression, and who ever heard of the "expenses of management" of a farm in the possession of a tenant? Plainly the proviso does not apply at all to cases like the present.

Upon the second branch, *The Attorney-General* v. *Dobree* (1) is absolutely conclusive, because it decides that a policy of insurance is "another interest" within sub-sect. (*d*). Here it is a marriage settlement that has to be dealt with, and it makes no difference that the husband brought no property into settlement except these policies. Would it alter the case and make it "an arrangement" if he had brought in £10,000? When a man marries, he brings in a very valuable consideration. He sells his liberty and he assumes liability for all his wife's antenuptial debts and *torts*, and it has never happened that the extent of the consideration brought in by either party was sought to be weighed by the Court, in a question of a marriage settlement, except when there is an attempt to limit a man's property in bankruptcy. *The Lord Advocate* v. *Fleming* (2), did not arise under the Finance Act at all. Mr. Soward, in his book, is radically wrong when he attempts to trace how much of the joint result has been brought in, by each of the parties. In order to support the contention of the other side, it would be necessary to append to clause (*d*), a proviso in these terms:—"When the other interest is a policy of insurance, only so much

(1) [1900] 1 Q. B. 442. (2) [1897] A. C. 145.

as has been contributed by the deceased shall be liable to Estate Duty."

Cur. adv. vult.

June 18.

PALLES, C. B. :—

This information raises two questions. The first relates to the *maximum* value which can be placed, under the Finance Act, 1894 (57 & 58 Vict. c. 30), upon the judicial tenancy under the Land Law Acts which was vested in the deceased at the time of his death. The second is whether, having regard to the particular trusts of the marriage settlement, finance duty is payable in respect of certain policies of insurance thereby settled.

The first of these questions is of great importance, as its decision involves considerations of extremely wide application, and because the Inland Revenue insists (and, as the counsel for the Crown have told us, has insisted continuously, during the six years which have elapsed from the passing of the Finance Act) upon a mode of valuation of judicial tenancies which subjects them to an amount of duty many times greater than that which would have been payable were the defendants' contention correct.

By section 1 of the Finance Act, 1894, Estate Duty is imposed upon "the principal value, *ascertained as hereinafter provided*, of all property," &c. Thus every provision in reference to ascertainment of value is incorporated in the taxing section. One of the enactments relating to the ascertainment of value is section 7, sub-sect. 5. The words of the commencement of that sub-section are of the most general character, and refer to property of every description. "The principal value of *any* property shall be estimated at the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." The contention of the Commissioners is that this is the only provision in the Act applicable to the ascertainment of the principal value of a judicial tenancy; and they would be right, provided the sub-section terminated with the words which I have read. It, however, does not so terminate: it contains a proviso: and the question is the applicability of that proviso to the

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estimation of the value of the tenancy in question. It is in these words :—

> "Provided, that in the case of *any* agricultural property, where no part of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding five per cent. of the annual value so assessed."

These words are, apparently, so clear that it is difficult to see how any question can arise as to their construction. "Property," to be within the proviso, must answer two descriptions: 1, it must be "agricultural"; 2, it must be such that "no part" of its "principal value is due to the expectation of an increased income" from it. If it answer these two descriptions, then, apparently, all *inquiries* as to whether it is within the section are at an end, and in that event, a limit is placed upon the large discretion which the Commissioners would otherwise have had under the previous part of the sub-section, as to the estimation of its principal value. It is not necessary to seek the reason of the Legislature in making this exceptional provision as to agricultural property; but if it were, it would not be difficult to find a sufficient one, because it is a fact within common knowledge that the supply of agricultural land usually for sale in the open market is a limited quantity, and consequently that, when so sold, it often fetches a competition price.

Now, does the property in question here answer the two descriptions I have mentioned? (*a*) Is it "agricultural"? "Agricultural property" is defined to mean "agricultural land, pasture, and woodland" (1). Consequently, the farm in question, being necessarily of an agricultural or pastoral character, or partly agricultural and partly pastoral (for if it were not it could not be the subject of a judicial tenancy), is plainly "agricultural" within the meaning of the proviso. (*b*) Is it such that "no part" of its "principal value is due to the expectation of an increased income" from

(1) Section 22, I. (g).

it? It is not suggested in the information or in the evidence that there is any such expectation. Still, as we are engaged upon a question of construction, it is necessary, or at least it is satisfactory, to form a distinct opinion as to the meaning of these words. As to this, there seems to me to be no room for doubt. The subsequent portion of the proviso makes certain of the deductions under the Succession Duty Act, 1853, factors in ascertaining the *maximum* value; and in such an enactment it is legitimate to refer to previous decisions upon the portions of the Act so referred to and made use of, the presumption being that the new enactment is made with reference to the previous Act, construed by these decisions.

Now, in *The Attorney-General* v. *Sefton* (1), a question arose as to the liability to assessment for succession duty of part of Toxteth Park, near Liverpool, which, at the time of the succession, was unoccupied and unproductive, and not capable of being used productively for agriculture, or for any purpose other than for building. Further, it was not in demand or marketable as building land, nor was it capable of being sold or let profitably as such. It was, however, capable of being sold in the market, and would have fetched a price there. It was held that if, at the time when the interest of the successor accrued, the property had no saleable value, nor any actual or potential annual value, it was not capable of being assessed; and that neither possible increase nor diminution in its value, after the succession, was dealt with by the Succession Duty Act, and Lord Westbury was of opinion (although the question did not actually arise), that the property might have been assessed as upon an annual value equal to interest at 3 per cent. upon the price which might have been obtained for it.

This latter mode of assessment is not possible in Ireland in consequence of the 16 & 17 Vict. c. 34, s. 13 (to which I shall hereafter refer), which is in force here, although not in England, and as property intended to be used in the future as sites for building, and whose real value was as such sites, might in its state at the time of the death be "agricultural," it was necessary, in order to prevent its escaping finance duty altogether, to exclude them from the operation of proviso.

(1) 11 H. L. Cas. 257.

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The same observation applies to all agricultural property, the income of which is, or can reasonably be expected to be, augmented in the future by its conversion to a use different from and more profitable than that to which it is applied at the time of the death.

The province of the words, "where no part of the principal value is due to an expectation of an increased income from such property," is, in my opinion, to exclude cases of this class from the proviso, and it cannot be—indeed it was not—contended for the Crown that the farm in question can be within them.

In result, then, I am of opinion that the farm is within the opening words of the proviso; and that if the scope of that proviso is to be determined by the words by which the Legislature apparently defines it, viz. "any agricultural property, where no part of the principal value is due to the expectation of an increased income from such property," that farm must be within it.

The counsel for the Crown, however, contend that these opening words cannot be construed in their literal sense, but that "agricultural property" must, by construction, be limited to agricultural property of which the deceased was not, at his death, in actual occupation. That is, that in a taxing statute, a proviso introduced for the benefit of the taxpayer is to be restricted by construction, so as to extend, beyond the apparent import of the words which confer them, uncontrolled powers of valuation of the officers of the Crown. Such a construction of a taxing statute is certainly unusual, and is one which can be arrived at only by such a *necessary* implication as demonstrates intention as clearly as would express words.

I proceed, then, to examine the grounds upon which this necessary implication is said to rest. As I understand the argument, it depends mainly, if not entirely, upon the direction that, out of the annual value as assessed under Schedule A of the Income Tax Acts, a deduction shall be made for "expenses of management." To ascertain whether any force can be given to this argument, we must first consider the entire proviso.

In cases within it the maximum value is not to exceed twenty-five times the annual value as assessed under Schedule A of the Income Tax Acts, after making certain deductions. I conceive

that this reference to one only of the two schedules in the Income Tax Acts under which income tax is imposed in relation to land is nearly conclusive of the question here. Income tax under Schedule A is assessed in respect of the "*property* in land": that is, of land viewed as a thing capable of producing rent, in the economic sense of that word. Income tax under Schedule B is assessed in respect of the "*occupation* of land." I need not say that the taxes under these two schedules are distinct in their nature, that the latter tax is in respect of the produce resulting from the application of skill and labour to land which produce, after deducting rent, and the value of the labour, is estimated to leave a surplus, which will be the profits incident to the occupation of the land, or—less accurately—the profits of the business of farming. These profits the Legislature has thought proper to tax, not according to their actual amount, as they would have been taxed, had the Legislature deemed the cultivation of land a "profession, trade, employment, or vocation" within Schedule D, but upon an estimate which in the Act of 1842 is fixed at five-fourteenths of the rent taxable under Schedule A. In relation to assessment under Schedule A, the fact that the person to be assessed is, or is not, in occupation of the lands is absolutely irrelevant: that fact cannot affect either the amount, or the incidence, of the tax, under Schedule A, nor even the *total* amount of income tax payable under both Schedules A and B. It is material only so far as it ascertains the person who is to pay the tax under Schedule B. If a fee-simple proprietor were in occupation of land in England (to which s. 13 of the 16 & 17 Vict. c. 34, is not applicable) he would be liable to be assessed under both Schedules A and B. Under Schedule A he would be assessed at the rack rent at which the same were worth to be "let by the year," in other words, in identically the same way as if he were hypothetically tenant to himself. He would also be liable under Schedule B in exactly the same way as if he were such hypothetical tenant.

In ascertaining the principal value of this land, which is to be taxed as "property," one of the factors to be used is its value for the purpose of its taxation "as property" to income tax. The omission to refer to Schedule B is not because it was intended to exclude from the proviso land taxable under Schedule B, for *all*

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agricultural land, that is, all land within the proviso is taxable thereunder, not because it was intended to exclude cases in which the deceased was taxable under Schedule B, but because the tax under Schedule B was not in respect of land as property. The reason of the omission was that the tax under this schedule is in respect of profits resulting from the future application of labour to land; and to use it in such a connection would be to capitalise, for the purpose of ascertaining the present value of property, profits to be derived from labour to be applied to it *in futuro*.

Thus the enactment that the taxable values of agricultural lands shall be sums which are multiples of an amount ascertained by making certain deductions from the annual value assessed under Schedule A, and containing no reference to Schedule B, in my mind shows that the Legislature recognized that in determining that value the fact of the deceased being or not being in occupation was immaterial.

I now come to section 13 of 16 & 17 Vict. c. 34, which I have already stated is an enactment applicable to Ireland only. It was by that Act that the Income Tax Acts were first applied to Ireland. In the previous year the General Valuation Act, 1852, 15 & 16 Vict. c. 63, had been passed. It had made provision for a general valuation of every county in Ireland, and upon the valuations so made rates for the relief of the poor were to be assessed. The Legislature, by the 16 & 17 Vict. c. 34, availed itself, for the assessment of income tax under Schedule A, of the valuations made and to be made under the last mentioned Act, and by its 13th section directed that the duties in Ireland under Schdule A, should be assessed by a poundage rate on the annual value of all tenements and rateable hereditaments according to the respective surveys and valuations from time to time in force for the purpose of the rates for the relief of the poor in Ireland.

This rateable value is, therefore, the first factor in the calculation directed by the proviso in sub-section 5. From it are to be made deductions of two classes: first, such as have not been allowed in the assessment to income tax and are allowed under the Succession Duty Act, 1853; and, secondly, the deduction for the expenses of management. The basis, therefore, of the taxation is the sum

which shall remain, after the deductions in question from the rateable annual value; and unless an excess of such annual value remains, after such deductions, there is no basis for taxation, and consequently there cannot be any taxation whatsoever. To illustrate my meaning, I shall take one of the deductions allowed under the Succession Duty Act, 1853, viz., head rent. Suppose A to be the owner in fee of Blackacre, of which the rateable annual value is £100. Suppose Blackacre is held by B, under lease for ever from A, at £50 a-year, that B has sublet it to C at £100 a-year, and that C is in actual occupation. What would be the maximum of the principal value of Blackacre, upon the death of each of those persons, A, B, and C? In the calculation of each of those principal values there will be one common factor, the rateable value of £100 a-year. Upon the death of A, the sum to be capitalised, at twenty five years' purchase, will be that £100 a-year, less the prescribed deductions, which deductions will not include head rent, because *ex hypothesi*, A is owner in fee. Upon the death of B, the sum to be capitalised will be the same £100 a year, after not only the same deductions as A was entitled to make, but after the further deduction of the annual rent of £50. But upon the death of C, the deduction from the rateable value of £100 a year of the annual rent, which also is £100, will extinguish the entire basis of taxation. As there is not an excess of rateable value over rent, there is not only no sum to be capitalised, but there cannot be even a sum out of which deductions other than rent can be made. In other words, in every case in which there is property capable of having a taxable value under the proviso, the rateable valuation of the land must be a sum greater than the rent.

There remain the words which have been the subject of so much comment: "and making a deduction for expenses of management, not exceeding five per cent. of the annual value so assessed."

The genesis of these words is plainly the decision of the Exchequer in *In re Elwes* (1). The section of the Income Tax Act allowing deductions is the 22nd: "In estimating the annual value of lands used for agricultural purposes an allowance shall be made for all necessary outgoings." In Elwes' case it was held that a deduction for the agent's charges for collecting rents could not be

(1) 3 H. & N. 719.

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allowed under this section, even when the successor was an officer serving with his regiment in India. The *ratio decidendi* is thus expressed in the considered judgment of the Court: "The petitioner may return from India, to-morrow; and this is not an outgoing at all, certainly not a necessary outgoing." The section into which section 22, qualified by the alteration under consideration is brought, is one dealing, not with the nett annual value of property for one particular year for the purpose of taxation of the income of that year, but with the nett annual value for the purpose of determining the principal value of the property. Were the nett value for one particular year that which was to be ascertained, it is possible that the necessity for the employment of an agent for that year might be determined; but where the thing sought is a principal value, a value to be ascertained by capitalising an annual value, that annual value ought, *primâ facie*, to be, not the nett annual value of one particular year, but the probable *average* nett annual value *in futuro*. It must necessarily be impossible to ascertain, when determining the finance duty payable in respect of a particular estate, whether the circumstances affecting any lands within that estate may not, in future years, be such as to render the employment of an agent necessary. Now, in respect of this particular deduction, the language used differs from that of section 22 of the Act of 1853. To be within the latter, the outgoings for which allowance is to be made must be "necessary," whilst the right to the allowance, "for expenses of management" under the proviso now under construction is not so qualified. This shows, as it seems to me, that the Legislature recognised the fact that it would be impossible to determine the necessity when the duty was being ascertained. I agree, therefore, with the counsel for the Crown that the meaning of the words used is that, in every case within the proviso, *some* allowance is to be made under this head, and that the matter left to the determination of the Commissioners is not whether *an* allowance is to be made, but, assuming that it is to be made, its amount or rate, not exceeding that prescribed.

This brings me to the last argument relied on for the Crown. It is said that, as *some* allowance is to be made in every case within the proviso, if that proviso extends to cases in which the deceased was in actual occupation, the allowance would be for the labour

of cultivating the land, that this allowance would be made against a rateable value, which necessarily must have been arrived at after making the proper allowances for the cost of cultivation. In this argument there is, in my opinion, a capital error. I shall illustrate my view by a particular example.

A person in actual occupation of land, and who holds at a rent less than the annual scheduled valuation, must, for the purposes of the proviso, be viewed in two separate capacities: first, as the owner of the land, viewed as a rent producing entity, the annual amount of that rent being assumed to be the rateable value of the land; and his property in that rent being the difference, between it and the lesser rent he himself pays; secondly, as a person in occupation of that land. These two capacities are distinct, and must be kept distinct; and the rights and obligations of each must be measured as if the person filling each capacity were a separate individual. In other words, in relation to his rights and liabilities in the second capacity, he must be viewed hypothetically as if he were in occupation of the land as tenant to himself, at a rent equal to the valuation. But as he is liable to income tax under Schedule A only in his first capacity, and as the amount of that income tax is the basis of the principal value in question in the section, "expenses of management," to be allowed as a deduction from the amount of the assessment under schedule A, must be expenses of management to be incurred by his estate so far as it represents him in his first capacity, *i. e.* as hypothetical landlord to a tenant who holds at a rent equal to the valuation. Expenses of management, therefore, to be within this section, cannot include expenses of cultivation: they must be the expenses of management incurred by a person who is to be deemed to be entitled to no more than a rent out of the land, and must therefore be limited to remuneration to a third party incident to the collection of that rent. This deduction is, therefore, consistent with the rest of the proviso. The same result will be arrived at by considering the person in occupation in his second capacity, viz. as hypothetical tenant to himself at a rent equal to the valuation. In this capacity, as I have already shown, as the rent is equal to the rateable value, there can be no excess of the latter over the former. But it is out of this excess only that the allowance is to be made for expenses

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of management. Therefore no "expenses of management" can be allowed to him in this capacity.

I am, therefore, of opinion that the direction to allow "expenses of management" does not afford any ground for excluding, from the operation of the proviso, cases in which the deceased person is in occupation.

I have now considered all the arguments used for the Crown, and I am clearly of opinion that they afford no reason for the limited and non-natural construction suggested, and I consequently hold that the case is within the proviso, and that the Commissioners' valuation of the farm in question cannot be permitted to exceed the sum which will be ascertained in accordance with the provisions of that proviso.

I have dealt with this question at a length which I admit is inordinate, not because I myself consider the question arguable, but out of respect for the legal advisers of the Inland Revenue Commissioners. I desire to add that even had I arrived at the conclusion that it was the necessary result of agricultural property in the occupation of the deceased being within the proviso, that "expenses of management" would include some part of the cost of cultivation, I should not be prepared to exclude for that reason such property from the proviso. In such an event I should hold that the sounder construction would be to include such property within the proviso, but to limit the application of the right to a deduction for the expenses of management to property in respect of which such expenses were capable of being incurred.

As to the allowances to be made in this particular case, in calculating the nett annual value which is to be multiplied by 25, I am of opinion that the defendants are entitled, under the 16 & 17 Vict. c. 34, sect. 15, to such deduction in respect of poor rate as would have been deductable from them by a tenant who held the farm at a rent equal to the valuation, viz. half the rate for the standard year, on the difference between £180 15*s.* (the rateable valuation) and £170, the head rent: in other words the poundage rate on £10 15*s.* The defendants are not entitled to any allowance in respect of county cess. Such a rate is incident to the occupation; and for the reasons I have already stated that element is to be excluded from consideration.

The defendants are also entitled, as I have already shown, to some allowance in respect of the expenses of management, as they have an interest, represented by £10 15*s.* yearly, which is taxable under Schedule A of the Income Tax Act. The amount of the allowance is, however, solely for the Commissioners.

The remaining claim of the Crown is for finance duty on the amount of the sums assured by the policies of insurance. As to this claim the Crown is, in my opinion, entitled to succeed. By the settlement upon the marriage of the deceased, after reciting four policies of insurance for sums amounting to £2500, which the deceased had effected upon his life, and that the intended wife was entitled to certain moneys: the policies, and the moneys of the intended wife, were assigned to trustees, upon trust as to the moneys secured by the policies (when received), to pay the income thereof to the wife for life, and after her death as to the principal moneys for the children of the marriage, and the trusts of the intended wife's moneys were to apply, after the marriage, so much of the income thereof as might be necessary to pay the premiums upon the policies, and to pay the residue thereof to the deceased, the intended husband, for life, and after his death to the intended wife for life, and after the death of the survivor in trust for the children of the marriage.

The wife pre-deceased the husband, and upon the death of the latter the moneys assured by the policies became payable, and the children of the marriage became entitled to them in possession. The claim of the Crown is that the moneys assured by these policies are within the description of clause (*d*) of sect. 2 of the Finance Act, viz.:—

> "Any annuity or other interest purchased or provided by the deceased, either by himself alone, or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased."

In construing this clause, it is convenient to take it in connection with the description in the immediately preceding one (*c*):

> "Property which would be required on the death of the deceased to be included in an account, under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted."

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with a certain extension unnecessary to be considered here. Reading in the two sections thus referred to, this clause (*c*) includes "money received under a policy of assurance effected by" the deceased "on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money, in proportion to the premiums paid by him, where the policy is partly kept up by him for such benefit." In the present case the policy had been kept up for the benefit of the children, not by the deceased personally, but by the application, through the trustees, of the interests of the moneys brought into settlement by the wife; and therefore the policy-moneys are not within clause (*c*). It is not very easy to appreciate the argument for the defendants; for their counsel, although more than once requested to apply their attention to the words of clause (*d*) of section 2, and to show that such words did not comprise these moneys, omitted to do so, and confined their observations on this part of the case to two general heads; first, that as the moneys in question are not within clause (*c*), therefore they are not within clause (*d*): secondly, that the policy moneys did not "pass" upon the death of the deceased.

The first of these arguments is wholly illogical. In an Act of this class, one of the very objects of the property made liable to taxation being described under various heads is that some subject-matter which may escape inclusion under one head may be captured by another. There is no object in any particular property being included under more than one head. If, by the second argument, it be intended to draw a distinction between "property" which "passes" within the meaning of section 1, and property "deemed" to pass under section 2, I agree in it. But the whole question here arises upon section 2. Property, within any of the descriptions in that section is by the operation of section 2 brought into section 1, and rendered liable to the duty, although, but for section 2, it could not be deemed to be included in the property passing on the death of the deceased. There is one peculiarity in a policy of insurance upon the life of a deceased person which, were it not for section 2, might have rendered it arguable whether, when it was vested in the deceased himself, at his death the full amount assured would have been liable to duty

upon his death. It is this: that during his life the moneys assured thereby were not in existence, *quâ* money. Immediately, before the death his property in the policies consisted of a contingent right to sue at a future period upon a contract which, at that time, had not been broken. The moneys assured would not in that event have passed on the death, as to so pass they should have previously existed, but on that death, or at some period ascertainable by reference to the death, the right to the moneys accrued or arose for the first time. The words, however, which I have quoted from clause (*c*) of section 2, negative any such argument. They render liable to duty, under certain circumstances, "money received under a policy of insurance" on the deceased's life, although the policy was not vested in him at his death. This satisfies me that "property" which "passes on" the death, under section 1, must be taken to include moneys assured by policies of insurance on the deceased's life which are vested in him at his death, although that which really passed was not the actual money assured, but the benefit of the contract of insurance. For the same reasons, I am of opinion that property "deemed" to be "included" in "property passing on the death," within section (2), includes property assured by policies of insurance on his life, if such policies or the moneys assured thereby are within any of the descriptions in the clauses (*a*) to (*d*) of that section.

Thus, the only question appears to me to be, are the policies in the present case, or the moneys assured thereby, within clause (*d*)? A moment's consideration of the words of that clause seems to me to be sufficient to demonstrate that they are. "Any annuity or other interest." "Interest" here must plainly mean interest in property. I pass over, for a moment, the next following words, and I come to the words, "to the extent of the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased." "Interest," "to the extent of the beneficial interest," is not a very happy expression; but the meaning is clear. The thing subjected to taxation is "the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased, in any annuity or in any other interest in property purchased or provided by the deceased," as mentioned in the section. The words "accruing or arising" are used in contradis-

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tinction to "passing." They indicate, not the transfer upon death to another of something which the deceased or some other person had before or at the death, but the springing up, upon the death, and the then vesting in another, of property which previously had not been existing in any one. This is an exact description of money secured by a policy of insurance. If, then, the policy moneys here answer the description in the clause, viz. if they were an interest in property purchased or provided by the deceased, as therein described, they must be included in it.

Now, were they so "purchased or provided"—that is, were they purchased or provided by the deceased in concert or arrangement with his wife? I cannot frame to my mind any doubt that the marriage settlement constituted a provision by the deceased, by arrangement with his wife, that the policies in question should be so kept up that on the death of the survivor of the husband and wife the whole beneficial interest in the moneys thereby assured should accrue and arise to the children of the marriage, that such beneficially acquired interest did in event accrue and arise accordingly, and that the marriage settlement brings such "interest" of the children into clause (*d*) of section 2.

Upon the whole, then, I am of opinion that the true effect of clauses (*c*) and (*d*), taken together, in relation to money received under policies of insurance effected by the deceased on his own life, is that the policy moneys, although not vested in the deceased at his death, are liable under clause (*c*) to duty, if the policies have been wholly kept up by him for the benefit of another; and that part of such policy moneys is so liable where the policies are partially kept up by him for such benefit. This liability arises from the fact of the policies having been kept up by the deceased, and is independent of the existence of any obligation upon him to do so, or any arrangement between him and any other person in relation thereto. As, however, to policies which are neither vested in the deceased, nor in fact kept up wholly or partially by him for the benefit of others, the only liability to duty is under clause (*d*); and this depends upon an arrangement within the meaning of the clause having been made by the deceased.

The Lord Advocate v. *Fleming* (1), which was much relied on

(1) [1897] A. C. 145.

for the defendants, would have been in point, had the present case turned on clause (*c*), as it was decided upon the Customs and Inland Revenue Acts of 1881 and 1889, parts of which are incorporated in that clause; but it has no bearing whatever upon the liability to duty under clause (*d*), which is the question here.

The *ratio decidendi* there was that as from 1883 until the father's death in 1890 the policies had been, in fact, kept up by the daughter, and not by the father, they were not "kept up by the father for the benefit of the daughter," within the meaning of the statutes.

The facts in *The Attorney-General* v. *Dobree* (1) were not identical with those before us. There the policies were, in fact, kept up by the deceased, and, for myself, I should have had no difficulty in holding that, for that reason, the moneys assured were within clause (*c*) of sect. 2. But, in addition to that, the premiums were so paid by the deceased under a covenant in a settlement, and therefore the case was also within clause (*d*); and the decision was that they were taxable under the latter clause. This was a decision by a Court whose jurisdiction is co-ordinate with ours, upon an Imperial Statute rendering property in England and this country liable to taxation under similar circumstances and at similar rates; and having regard to the grave inconvenience that would result from two different systems of taxation being in operation in the two different countries, under the same enactment, applicable in the same manner to each country, even had I doubts as to the decision I should have bowed to its authority, and left it to be questioned, if at all, in the Court of Appeal and House of Lords. My own opinion, however, is, for the reasons I have already given at length, entirely in accord with the decision.

As regards the costs of the suit, it is avowed that in consequence of the construction of sect. 7, sub-sect. 5, which the Inland Revenue Commissioners take, and have taken and acted upon for the last six years, this information would have been filed, even had the defendants been willing to pay duty on the policy moneys. For that reason, whilst the defendants must pay any costs which would not have been incurred had the claim for duty on the policy moneys not been resisted, they are, in my opinion, entitled to be

(1) [1900] 1 Q. B. 142.

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paid by the Crown, with this exception, the general costs of the suit.

JOHNSON, J.:—

I have carefully examined and considered this case which, though small in itself, is of general and far reaching importance, and I have had the opportunity of reading the judgment of the Lord Chief Baron on the facts of the present case, in which I concur. I am, however, not free from doubt as to the scope and application of the expression "Expenses of Management," which broad question does not, I think, arise in the present case, and I am inclined to think that in general it is limited to those cases in which management exists in fact and is in the nature of things reasonably necessary, even if not absolutely indispensable to the administration of the property, inherent (so to speak) in the property which is the subject-matter of the succession of which the former owner and the successor respectively could not (however active and careful their personal supervision) in reason maintain, carry on, or develop, without the assistance of managers, often highly remunerated for their services—such, for illustration, as proprietary mines or factories or large establishments in trade, consisting of several departments, or with branches in different places, or a proprietary railway, or a large residential property, or such like instances which might be multiplied largely—and that when deduction is claimed for expenses of management the governing consideration is whether the employment of management by the successor is reasonably necessary, having regard to the nature and circumstances of the property itself, which is the subject-matter of the succession, and not to the personal convenience or interest of the successor. And it is for the Commissioners to ascertain this and decide on the allowance (if any), not exceeding the statutable limit.

BOYD, J.:—

I have had an opportunity also of reading the judgment of the Lord Chief Baron, and I entirely concur.

Solicitor for the informant: *R. O'Brien Furlong.*

Solicitors for the defendants: *A. & J. Robinson.*

J. L.

REG. (JACOB) *v.* BLANEY (1).

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Feb. 20, 21, 22, 27.

Quo warranto—*Office held during pleasure—Surgeon of county infirmary—5 & 6 Geo. 3 (Ir.), c. 20—61 & 62 Vict. c. 37, s. 15.*

The office of surgeon of a county infirmary, being held during pleasure, is not one in respect of which *quo warranto* lies.

QUO WARRANTO.

Application to make absolute, notwithstanding cause shown, a conditional order that an information in the nature of a *quo warranto* be exhibited against Dr. N. J. Blaney to show by what authority he claimed to use and enjoy the office of surgeon to the Queen's County Infirmary, on the grounds :—(*a*). That the said William Gardner Jacob being the surgeon and physician of the said infirmary duly and legally elected, it was not within the power of the joint committee of the Queen's County Infirmary to arbitrarily dismiss him unless for neglect of his duties, incapacity, or misconduct; and no such allegation was ever made against him or exists; (*b*), that the office of surgeon and physician to a county infirmary was not one determinable at the pleasure of the committee of management, and that the holder of such office when legally elected was irremovable except for incapacity or misconduct on the grounds of public policy; (*c*), that the joint committee had no power to remove a physician or surgeon to an infirmary at a special meeting such as the meeting of the 22nd November, 1899, was, even assuming that they possessed any such power at one of their last general quarterly meetings under section 7 of 5 & 6 Geo. 3, c. 20; (*d*), that the meeting called for the 25th October, 1899, was a special meeting summoned for a special purpose, as announced in the advertisement calling said meeting, namely, "to elect a duly qualified physician and surgeon to the Queen's County Infirmary, and that it was not competent for the majority of the said committee to then pass a resolution expressing the desirability of determining Dr. William Gardner

(1) Before SIR P. O'BRIEN, L.C.J., and GIBSON, MADDEN and KENNY, JJ.

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Jacob's services or to direct a new special meeting to be called for the 22nd November, 1899, to dismiss Dr. Jacob from his office of physician and surgeon to the said infirmary, or to give notice of motion for such purpose at said special meeting of the 25th October, 1899; (*e*), that the said special meeting of the 22nd November, 1899, was not a legally authorised meeting, and that such notice of motion being irregularly received by the chairman at the meeting of 25th October, 1899, the dismissal of Dr. William Gardner Jacob thereat was also necessarily illegal, and the appointment of the said Dr. N. J. Blaney at the said meeting of the 10th January, 1900, was also necessarily illegal, as such appointment necessarily was the outcome of the previous illegal action at antecedent meetings of the said joint committee.

By the 5 & 6 Geo. 3, c. 20 (Ireland), power was conferred on the persons therein named to establish infirmaries or hospitals in the several counties of Ireland; and the Queen's County Infirmary was established under the provisions of the said Act, and of the statutes amending and supplementing the powers therein contained, and was managed by the governors and governesses thereof, who formed under the said Acts a body corporate with perpetual succession. By section 4 of the same Act it was provided that where a public infirmary or hospital should be erected or established in any of said counties and fitted for the reception of patients, the governors and governesses constituted as in said Act mentioned should give notice in two of the Dublin newspapers that the same was ready for the reception of patients, and that they would on a certain day to be named (which should be in twenty-one days at least from the date of said notice, and specifying the time and place), proceed to the election of a surgeon for such infirmary or hospital; and in case of a vacancy of a surgeon in any of the said infirmaries the governors and governesses should proceed to elect in the manner and form aforesaid. By section 7 of the same Act it was provided that said governors and governesses (five of whom were to form a quorum) should have four general quarterly meetings in every year at such infirmary or hospital, and that they should at any general meeting have power to elect or remove a physician, or surgeon, and servants; and to order and regulate the whole economy and expense of such infirmary or

hospital; and that in case of a vacancy of a physician or surgeon by death, or otherwise, to summon by advertisement in two Dublin newspapers general Boards on these particular occasions for the purpose of supplying every such vacancy, at which general Boards five should form a quorum.

The relator, a qualified medical doctor, had been appointed surgeon and physician to the infirmary at a meeting of the governors and governesses held on the 20th May, 1898. Prior to this date he had been acting as assistant medical officer to the infirmary for eighteen years. After the passing of the Local Government (Ireland) Act, 1898, a joint committee was appointed (pursuant to section 15) consisting of 24 members—15 nominated by the county council—and 9 by the governors and governesses; and the powers and duties of the old corporation of governors and governesses were transferred to the joint committee. Shortly afterwards the joint committee by a majority declared Dr. Jacob's office vacant, in the first instance without assigning any cause, and issued advertisemets for candidates for the office; subsequently, a special meeting was summoned for the 25th October, 1899, for the purpose of appointing a physician and surgeon. At this special meeting no appointment was made, but notwithstanding protest a resolution was passed that the services of the relator be terminated, and a lengthy notice was given that at a special meeting of the committee to be held on the 22nd November, 1899, a resolution would be moved that Dr. Jacob's services be terminated on the grounds "that apart from an illegal attempt to hold the position despite popular representation, and the provisions of the Local Government Act, 1898, having regard to the number of medical appointments held by" him it was "not possible for him to give to the infirmary the time and attention," &c. This was the first suggestion of any ground for the change or suggestion of "cause."

The resolution was passed by a small majority at the meeting of the 22nd November; advertisements were published; and the respondent (Dr. Blaney) was shortly afterwards declared elected to the office, and had since acted therein. The relator denied that at any time had any complaint been made against him, and charged that the suggested "cause" was an afterthought.

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Ronan, Q.C., Campbell, Q.C., and *Brunskill*, for the relator.

The Right Hon. The Macdermot, Q. C., and *D. Kehoe*, for the respondent Blaney.

Falconer, Q.C., Healy, Q.C., and *Dudley White*, for the Queen's County Infirmary.

The statutes and cases cited during the argument are fully referred to in the judgments of the Court.

Cur adv. vult.

Feb. 27.

SIR P. O'BRIEN, L. C. J.:—

The question which stands at the threshold of this case needs only to be stated to indicate its very general importance.

It is this:—Is the office of surgeon or physician to a County Infirmary one held at the pleasure of the appointing body and therefore determinable at will? If this question is to be answered in the affirmative, Doctor Jacob's application for an information in the nature of a *quo warranto* must be refused. The question then that presents itself at the very outset is one as to the tenure of the office. Is the office held at the will and pleasure of the joint Committee appointed under the Local Government Act in whom the right to appoint is now vested, or is the office held for life or what is tantamount to a freehold office, during good behaviour. To use the language of the books, Is the office held "*durante bene placito*," or "*quamdiu se bene gesserit*"? If the office is held at will, the holder can be dismissed arbitrarily at any time, and *quo warranto* will not lie; if held during good behaviour he can be dismissed only for cause, and proceeding by *quo warranto* is applicable. This was conceded in the argument.

Dr. Jacob, the applicant in this case, contends that the tenure is one during good behaviour and that accordingly he can be dismissed only for cause, and that, as he was dismissed without cause, he is entitled to be reinstated in the office. The question is, as I have already said, of general importance, involving the character and nature of the tenure of the physician and surgeon of every County Infirmary in Ireland. The determination of the question depends upon the true construction of certain sections of

two Acts of Parliament—on the construction of the 15th section, clause 8, of the Local Government Act, 1898, and of the 7th section of the 5 & 6 Geo. 3, c. 20. The language of the Irish Local Government Act, 1898, is as follows:—

> "Nothing in this Act shall deprive any existing officer of any Infirmary or Hospital to which this section applies of any privileges enjoyed by him under any Act, and such officer shall not be removed from his office except with the consent of the Local Government Board; but, subject as aforesaid, every officer of the Hospital or Infirmary may be appointed or removed by the Committee appointed under this section."

This is the provision of the Local Government Act which we have to construe; and, if the matter were *res integra*, depending solely on this clause, I would have no difficulty whatever as to its construction. Dr. Jacob does not fulfil the definition of "existing officer," and it is quite clear to my mind that the only restriction upon the power of removal in the section is the consent of the Local Government Board as to "existing officers." The power of removal as to other officers is unrestricted and absolute.

There are some other sections in the Local Government Act which throw light upon the matter; for instance, the 83rd and 84th sections. These show that, where the power of removal was to be subject to restriction, it was made expressly subject to such restriction: see sub-sections 1, 4, and 6, of section 83; and see also sub-section 1 and 4 of section 84. I might also refer to sub-section 2 of section 90, which, in my opinion, shows that the word "remove" would, but for the restrictions and conditions therein expressly imposed, involve an unrestricted and absolute power of removal.

There is no express restriction whatever on the power of removal given by the 8th clause with which I am now dealing. As I have already said, if the matter rested solely on the language of the 8th clause, I should have no difficulty whatever as to its true construction; but it is argued that it was not intended to give to the appointing body a greater power than that which was conferred by the 7th section of the 5 & 6 Geo. 3, c. 20, and that the cases which have been decided upon that statute have

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established that the office in question is a permanent office, held during good behaviour, and not determinable at the will of the appointing body.

Sir P. O'Brien, L.C.J.

Before I advert to the decisions which have been pressed with so much energy on the attention of the Court, it is well to refer to the language of the 7th section of the Act 5 & 6 Geo. 3. That section enacts (in effect, that the Governors and Governesses of each respective Infirmary (five of whom shall be a quorum) shall hold four general quarterly meetings in every year at such respective infirmary or hospital and shall at any general meeting *have power to elect and remove* a physician or surgeon and servants. This is the relevant portion of the section.

Looking to the language of the Act we think that the meaning and intention of the Legislature was that the appointment should be during pleasure only and not during good behaviour.

The object of the Act is expressed in the preamble, namely, to provide means for restoring the health and preserving the lives of many of Her Majesty's subjects. How is this object best promoted? Is it by the physician or surgeon holding at the will of the appointing body? or by a tenure which made it a condition of his dismissal that cause should be shown? Opinions may vary as to this; some may think that the object is best subserved by the tenure being permanent; others may be of opinion that prompt and continuous attention to the sick by capable medical men, physically and professionally qualified to give that attention, is best secured by leaving an absolute power of dismissal in the hands of the appointing body, and that such a power as a general rule more effectually stimulates the energies of the employed by giving greater control to the employer, and enables emergent conditions to be more effectually dealt with. Take the case of an epidemic. Suppose some man is physician and surgeon to an infirmary, upon whom age lays its hand and who is not keeping pace with the advance of science. This no doubt might be "cause" for his dismissal, but it may be thought, if in every case cause is to be critically considered and established, that—if incompetence must be established as a condition precedent to the right of dismissal by laymen who discharge a gratuitous duty and are not fully posted as to the requirements and progress of medical science, delay often

disastrous would ensue, and that great reluctance to interfere at all would result. I can well understand men who are not experts, and who discharge a gratuitous duty, being reluctant to interpose at all if they cannot interpose with unrestricted power. However, as I said, opinions may vary on this subject. It is more or less a matter of idiosyncrasy, but the all-important consideration for us is, What did the statute say? What is the true construction of its language? It says that the appointing body "shall have power to elect or remove." There is no restriction whatever attached to the word "remove." The power of removal is not made subject to the approval of any other body, nor has any other body power to veto it. Still further, it is to be noted that the words "to elect or remove" apply equally to the servants as well as to the physician and surgeon of an infirmary. The principles of construction require that the same words in the same sentence should have the same meaning in reference to all to whom they apply; and certainly it would be a very extravagant proposition—as Lord Justice Holmes pointed out in the case of *Hayes* v. *Richmond Asylum* (1)—that the servants of an infirmary hold during good behaviour and are not dismissible at will.

There is a passage in Chief Justice Tindal's judgment in the case of *Smyth* v. *Latham* (2) which bears upon the matter I am now discussing; he is reported to have said:—

> "Again, the power given to the Commissioners of appointing paymasters is expressed in the enacting part of the tenth section in precisely the same language as that which authorizes them to appoint such other officers and clerks as they shall deem necessary. The same words in the same section must receive the same construction; but it would surely be an unreasonable construction of the clause to say that all the officers and clerks appointed to assist the paymasters had a freehold interest in their office, and were not removable at the pleasure of the Commissioners."

This passage in Chief Justice Tindal's judgment is very apposite. To my mind it is absolutely plain, from the language of the statute, that the tenure was one at will; but a member of the Court, my brother Madden, asked Mr. Ronan whether if the

(1) 28 L. R. Ir. 107. (2) 9 Bing. 692.

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statute of George 3, with which I am now dealing, had been passed within recent years—containing the 7th section upon which the controversy turns—it would not be plain that the power of dismissal was unrestricted. Mr. Ronan replied that he preferred not to answer the question, and said that his position did not rest on the language of the statute alone, but upon that language as expounded by judicial decisions. Mr. Ronan was necessarily forced to this answer. The stress of the situation required it from him; but, in my opinion, it demonstrates the untenable character of his position, because the only case which dealt with the tenure of the office as an essential ground of decision was *Reg.* (*Fitzmaurice*) v. *Neligan* (1) which decided that the tenure was not one during good behaviour, but one at will.

Both Mr. Ronan and Mr. Campbell pressed the case of *Reg.* (*Kinkead*) v. *The Governors of the Galway Infirmary* (2) upon the attention of the Court. There are no doubt certain *dicta* in that case of Mr. Justice Harrison and Mr. Justice O'Brien as to the tenure of the office. But the case was decided on other grounds, and the observations of these learned Judges, not being essential to the determination of the case, come within the category of mere *obiter dicta*. Indeed what Mr. Justice Harrison said was merely the hesitating expression of a present impression and did not in any way approximate to the pronouncement of a final opinion.

What the late Mr. Justice O'Brien said was not essential to his decision, and must be treated as a dictum merely; and, as it was a dictum and nothing more, I am at liberty to say that I cannot accept it. He is reported to have said (3):—

> "The rule, however, which I deduce from the cases, not perhaps strictly logical, but still occupying that narrow space in which it is not in conflict with actual decision, is that the remedy of *quo warranto* applies whenever the office is not held at will and pleasure by the express terms of its constitution or of the power of removal."

This would appear to me to be at variance with many decided cases and with the doctrine laid down by Chief Justice Tindal in *Smith* v. *Latham* (4). He showed that the words "at will" and

(1) 14 L. R. Ir. 149.
(2) 24 L. R. Ir. 210.
(3) 24 L. R. Ir. 220.
(4) 9 Bing. 692.

"during pleasure" are often inserted unnecessarily and for greater caution—that the tenure of many offices, having regard to the language of their creation, would be *at pleasure*; and that the express addition of such words as "during pleasure" was made *ex abundanti cautela.*

However, Lord Justice Holmes, in *Reg.* (*Ryall*) v. *Bayly* (1) very clearly and, in my opinion, very accurately, tells us what was done in *Kinkead's Case* (2) to the judgment in which he was a party. Speaking of the confusion which existed as to what offices could be the subject of an information in the nature of a *quo warranto* he said:—

> "The second cause of confusion is that informations have been allowed to go in silence, where the point has not been raised. An example of this kind is to be found in the case of an office to a county infirmary which, although probably held at the pleasure of the governors, has, on at least three occasions, been the subject of an information in the nature of a *quo warranto*. At length the point was made in *Reg.* (*Kinkead*) v. *The Governors of the Galway Infirmary*, on the application for a writ of *mandamus*, consequent upon a judgment of ouster; but it was not decided, as the *mandamus* was decided on other grounds, and in any case the objection would have come too late, the proceedings by *quo warranto* having already terminated in a judgment."

This is the well-considered language of Lord Justice Holmes in *Kinkead's Case* (2), and, in my judgment, it states the position with great accuracy as to that case, and shows that it in no way sustains the proposition contended for on behalf of the applicant, namely, that it was a decision of the Court on the point we are discussing here, whether the office of physician and surgeon to a county infirmary is one held during pleasure or during good behaviour.

No doubt, in some cases, as Lord Justice Holmes said, where the point was not raised, the informations have been allowed to go in silence. *Quandoque bonus dormitat Homerus.* However it is, I think, absolutely clear that no case is a final authority upon a point not raised at the bar and discussed and determined by the Bench. This brings me back to the case of *Reg.* (*Fitzmaurice*)

(1) [1898] 2 Ir. R. 335, at p. 341. (2) 24 L. R. Ir. 210.

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v. *Neligan* (1) decided by the full Court of Queen's Bench in the year 1884, the unanimous decision of the Court consisting of Chief Justice May, my brother Johnson, and the late Mr. Justice O'Brien.

The question in that case was whether certain subscriptions were paid before a vacancy occurred. Dr. Lawlor, who had been surgeon to the County Kerry Infirmary, sent in his resignation, and the question arose whether the resignation was complete when he sent it in. If then complete, and if acceptance by the governors was not necessary, the vacancy (upon the date of which the question depended) had taken place. It was decided unanimously by the Court that, as Dr. Lawlor held at pleasure, the resignation was complete; that there was a correlative power to dismiss and to resign; that the surgeon could be dismissed at will, and could resign at will. This was the very ground of the decision, that the tenure was at will and not during good behaviour. This, being the very pivot of the judgment, was no mere *dictum*. Chief Justice May, in giving the unanimous judgment of the Court, is reported to have said:—

> "The surgeon of an infirmary is merely the paid servant of the governors, who receives a salary for his personal services. The governors apparently may dismiss him at any time arbitrarily, and, by way of converse, it was competent to him at any time to resign."

This concludes, as far as this Court is concerned, the question before us. No doubt, in the Kerry case, the *quo warranto* issued, but the point was not raised, or considered, whether it should not issue if the office were held at will. Looking at the entire case, looking at the language of the Local Government Act, which in my judgment is absolutely clear, and throws a light backward upon the Act of George 3, and if, indeed, any such light was at all required, looking at the decision in *Bayly's Case* (2), and the reasons of the Judges in that case, and the essential ground of the judgment in *The Queen* v. *Neligan* (1), I think it is absolutely plain that the office was held during pleasure, and that accordingly we should not grant this application. It must be refused with costs. Before I conclude I desire to add

(1) 14 L. R. Ir. 149. (2) [1898] 2 Ir. R. 335.

that I am entirely satisfied that Dr. Jacob is a gentleman of high professional skill and thorough competence, and that he would fill with a conscientious appreciation of its responsibilities any post to which he might be elected; but the legal question which meets us at the outset prevents us from giving him the redress he seeks.

GIBSON, J.:—

This application for *quo warranto* is opposed on two grounds:—First, that the position of surgeon is not one to which that remedy is applicable, which raises a pure question of law; secondly, that if the surgeon could only be removed for cause, there was good and sufficient cause, which depends entirely on matters of fact. Dr. Jacob contends that the action of the Council was not *bona fide*, and that there was no just ground for dismissal. Upon this second question I confine myself to saying that, while the decision of the Council ought not to be lightly impeached, the applicant may fairly ask to have the matter brought before and tried by a jury. To vindicate his rights, he is entitled to have the writ issued if his office was freehold.

The main question is, however, that of law, as to the nature of the office or employment. It has been fully argued. Applicant's counsel urge—1, that it has been established by a course of decision binding on this Court that the office is of such tenure as to be the subject of *quo warranto*; 2, that, apart from authority, the office is held during good behaviour and not at will. I shall consider these points separately. It was not disputed that if the office was at pleasure the conditional order must be discharged.

1. The authorities are in a very unsatisfactory condition. Those which the applicant presses cannot be relied upon, either because the point escaped notice, as in *Reg.* (*Lawlor*) v. *Alton* (1), or because the *quo warranto* was refused on other grounds, as in *Runciman's Case* (2). In *Kinkead's Case* (3) the writ and judgment of ouster went apparently without this question being brought to the attention of the Court; and, when the consequential remedy of *mandamus* was applied for, it was refused for different

(1) Ir. R. 6 C. L. 256. (2) 28 L. R. Ir. 527. (3) 24 L. R. Ir. 210.

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reasons. No doubt the report contains strong *dicta* as to the durable tenure of the office, but these *dicta* form no part of the actual decision. The refusal of the writ, where several grounds of decision are competent, does not carry the same weight of authority as the allowance of the writ. This is explained in *Reg.* v. *Darley* (1). The *dicta* pronounced by eminent Judges are entitled to respectful attention, but their value in this case is much affected by the remarks of Holmes, L. J., in *Bayly's Case* (2), and by the fact that *Neligan's Case* (3) was not cited and was not present to the mind of any of the Judges.

Reg. v. *Neligan* (3) seems a direct decision as to the nature and tenure of the post of infirmary surgeon. Unfortunately *Darley's Case* (1) was not mentioned or relied on, and both counsel and the Court entirely overlooked the consequence that tenure at will was or might be an answer to the writ. Of course the Court did not affect or intend to overrule the House of Lords or reverse settled law. A point overlooked is not a point decided. There was, indeed, a controversy as to the constitution of the appointing body, and Lord Justice Holmes, in *Bayly's Case* (2) suggests that such an element might justify the writ. Even if this view be well founded, I do not think that the allowance of the writ in *Neligan's Case* (3) proceeded on any such ground. The point argued and decided was that the office being held at pleasure the holder could resign it at will without any acceptance of resignation by the governors. It was assumed that an office held during good behaviour could not be so vacated. This assumption was, I think, correct. The authorities referred to by Parke, J., in *The King* v. *Patteson* (4) are strong on the point. See also Bacon's Abridgment, title "Office"; Comyns' Digest, title "Office." To get rid of the difficulty express legislation has been found necessary in some cases. An example will be found in *Reg.* v. *Corporation of Wigan* (5) and *Pease* v. *Lowden* (6). I am not aware of any authority that a person can at pleasure divest himself of a freehold office. This case of *The King* v. *Patteson* (4) was cited in *Neligan's Case* (3) on behalf of the defendant. *Hill's*

(1) 12 C. & F. 520.
(2) [1898] 2 Ir. R. 335.
(3) 14 L. R. Ir. 149.
(4) 4 B. & Ad. 1.
(5) 14 Q. B. D. 908.
(6) [1899] 1 Q. B. 386.

Case (1) was the authority principally relied on by the applicant's counsel, though the report omits to mention this. *Reg.* v. *Neligan* (2) unfortunately slept forgotten for many years, and the decision was not noticed until it was referred to in *Auchinleck's Case* (3).

So far therefore as authority is concerned the Court is certainly not compelled to issue the writ. The only direct authority is adverse to the applicant. In any view decisions on the earlier legislation could not bind the Court in the interpretation of the Local Government Act which now regulates the *status* of the office.

2. If the Court is at liberty to treat the point as open, the next question is, what, apart from authority, is the tenure of the office under existing legislation? The answer depends partly on 5 Geo. 3 (Irish) c. 20, and partly on the recent Local Government Act. So far as relates to the former statute, it is agreed by counsel that the only material enactment is that contained in section 7. That section does not say whether the employment is at will or during good behaviour. If of the latter class it would be freehold. The choice is apparently between these alternatives. The question is not as to a corporate office or a common law or judicial post, the tenure of which is fixed by custom. It arises on a modern statute. Where such statute gives a bare right of appointment and removal without more, in connexion with a new office, I do not know of any decision that there is any *prima facie* presumption that the appointment is for life. *Harcourt* v. *Fox* (4) affirmed in error by the House of Lords, is sometimes referred to as bearing on the matter, but it gives no aid, as the office there dealt with was that of Clerk of the Peace, which the statute expressly made tenable during good behaviour. *Hill's Case* (1) tells strongly against the existence of any general presumption in the case of a new statutory office. *Bayly's Case* (5) is in the same direction. It may be that, even without an assisting context, the nature of an office, particularly when the holder's whole time is engaged, and his remuneration is fixed, may raise an inference of durable tenure. No authority has been cited as to such a case, and I only guard myself from being supposed to decide it. But here

(1) 8 Moo. P. C. 138.
(2) 14 L. R. Ir. 149.
(3) 28 L. R. Ir. 404.
(4) 1 Shower, 506.
(5) [1898] 2 Ir. R. 335.

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In the interval between the establishment of these two propositions there was a period of uncertainty, during which several cases were decided in which a similar conclusion was not formulated by this Court. But they were cases in which the Court was not called upon to determine the net point of the tenure of the office, and they were decided before the decision of this Court in *Reg.* v. *Bayly* (1). I do not regard the rule there laid down as a self-evident proposition, nor do I think that it follows from the decision in *Darley* v. *Reg.* (2) with such a degree of certainty as to involve in a charge of crass ignorance the counsel who failed to raise the point, or the Judges who did not force it on the notice of counsel. For the decision in *Darley* v. *The Queen* (2) was one which extended the remedy by information in the nature of *quo warranto*, by applying it to offices other than corporate offices or those created by charter derived from the Crown, "provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others; for with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie": per Tindal, C.J., in *Darley* v. *The Queen* (2).

The use of the word, "deputy or servant," as contrasted with the holder of "a substantive office" of "a public nature," suggested the argument which was pressed on this Court and on the Court of Appeal in *Reg.* v. *Bayly*. It was contended in that case that an office, though in strictness tenable at will, might nevertheless, from its public nature, its importance, and from the circumstances that it had been always dealt with as a substantive office, be regarded as of sufficient independence and consideration to rank among the class of offices to which the remedy by information in the nature of *quo warranto* had been extended by the decision in *Darley* v. *The Queen*. And some observations of eminent judges were referred to which gave colour to this argument, especially the language of Erle, J., in *Reg.* v. *Guardians of St. Martin's* (3), and of Smith, L.J., in *Reg.* v. *Burrowes* (4), who referred to the tenure of certain offices as "secure enough" to satisfy the rule. The want of definiteness in the language of the cases, noticed by

(1) [1898] 2 Ir. R. 335.
(2) 12 C. & F. 541.
(3) 7 Q. B. D. 159.
(4) [1892] 1 Q. B. 309.

Lord Justice Holmes in his judgment in *Reg.* v. *Bayly* (1), accounts for the fact that until the decision in the last mentioned case, the question was involved in a certain degree of obscurity.

Until the decision in *Reg.* v. *Bayly* it was a matter of doubt whether *mandamus* or *quo warranto* would lie in respect of the office in question. The point was discussed in *Reg.* v. *Governors of Galway Infirmary* (2), but under circumstances which prevent that case from being considered an authority on the point. The *mandamus* was refused on other grounds, and in any case the objection would have come too late, inasmuch as a writ of *quo warranto* had been already issued, which had terminated in a judgment of ouster. I gather from the judgments in that case, that Harrison, J., and O'Brien, J., inclined to the opinion that the office was one in respect of which *mandamus* might issue; but, as has been pointed out, there was no decision to that effect, because the writ of *mandamus* in that case was consequential upon, and ancillary to, a writ of *quo warranto*, followed by actual ouster. In addition to this circumstance, the fact that the writ was refused deprives that case of authority as a decision upon the question now before us.

But, though I find in the cases to which we have been referred some doubtful expressions, still I can find no expression of dissent from the opinion expressed by May, C. J., in *Reg.* v. *Neligan*, which was the foundation of the judgment of the Court:—"The surgeon of an infirmary is merely the paid servant of the governors, who receives a salary for his personal services. The governors apparently may dismiss him arbitrarily, and by way of converse it would seem that it is competent to him at any time to resign": *per* May, C. J., in *Reg.* v. *Neligan* (3). This is the real question in the case before us, for, if the relator could have been arbitrarily dismissed, it would not assist his case to establish that the office of surgeon could, in some other state of facts, be made the subject of a writ of *quo warranto*.

Mr. Ronan was unable to contend that the words of 5 & 6 Geo. 3, c. 20, were sufficient, in themselves, supposing the statute to have been enacted in the last session of Parliament, to create an

(1) [1898] 2 Ir. R. 344. (2) 24 L. R. Ir. 210. (3) 14 L. R. Ir. 155.

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office of freehold tenure. He relied on the history of the office, and upon authorities which, he said, involved the decision that the office was held during good behaviour. Now I quite agree that a decision of long standing, ascertaining and determining the status of any particular office, ought to be dealt with in the same manner as a recognised authority deciding some question of real property law, around which proprietory rights may have come into existence. A decision of this class becomes part of the law of the land. If the Legislature should think fit to alter the law, it can do so with due regard to existing interests, which cannot be safeguarded by a Court when it overrules the decision on which they are founded.

But what are the facts in regard to the present case? The statute which we are considering was passed in 1765, and between that date and 1872 when the case of *Reg.* (*Lawlor*) v. *Alton* (1) was decided, the Law Reports are an absolute blank upon the subject. It might be a fair and reasonable inference from that authority that the office was held during good behaviour; but any idea of this kind was dispelled in 1884 when the Court decided the net point. Thus there never has been any recognised decision, of long standing, upon the faith of which members of the public, applicants for this office, could have relied; and therefore it seems to me that the case must be decided upon the construction of the statute, taken by itself.

I rest my judgment entirely upon the language of the Act of Geo. 3. I express no opinion as to the effect, if any, of the Local Government Act upon the tenure of an office in existence at the time when it became law.

KENNY, J.:—

Having regard to the circumstances under which, in at least three other cases of surgeons to county infirmaries, writs of *quo warranto* have been allowed to go, it is only right to say that the points in the present case have been fully and adequately urged, and that, apparently, no precedent has been left uncited and no argument unpresented on either side. We are confronted with two questions, both of which it is necessary to decide—the

(1) Ir. R. 6 C. L. 256.

one, whether the office of surgeon to a county infirmary in Ireland is one which the occupant holds during good behaviour; the other, whether, notwithstanding that that question may be answered in the negative, the writ of *quo warranto*, in respect of alleged usurpation of the office, should go. If the office be one held at the will of those who appoint to it—if the holder of the office be removable at the pleasure of the appointers, or of the elective body, as the case may be—then the law as to the propriety of issuing the writ is acknowledged to have been settled by the case of *Reg.* v. *Darley* (1). The office in that case was that of treasurer of the public money of the city of Dublin, and it was held that he was a public officer holding a substantive position, and—unlike, in this respect, the county treasurer in *R.* v. *Justices of Herefordshire* (2)—was not a mere servant of the magistrates who elected him, and was not removable at their pleasure. It is there laid down that if the office were one the holder of which was removable at pleasure, the proceeding by *quo warranto* would not lie. The reason is that it would be a futile proceeding to issue a writ of so grave a character where, notwithstanding its operation, the *de facto* holder of the office might be arbitrarily and summarily dismissed at the next meeting of the elective body. Therefore, if there can be no reasonable doubt that the office of surgeon to a county infirmary is held at pleasure, we ought not to allow the writ to issue, in order to test the question of alleged usurpation.

The relator in the present case was elected to the office of surgeon to the Queen's County Infirmary on the 20th May, 1898. He is not an "existing officer" of the infirmary within the meaning of the Local Government (Ireland) Act, 1898, inasmuch as he did not fill the position of surgeon to the institution on the last day of March, 1898: Local Government (Ireland) Act, 1898, sect. 109. He therefore comes within the latter part of sect. 15, sub-sect. 8 of the Act, which provides that "every officer of the hospital or infirmary may be appointed and removed by the Committee under this section." Former appointments were governed by the 7th sect. of 5 Geo. 3, cap. 20 (Irish), which empowered the governors of the infirmary at any general quarterly meeting "to elect or remove a physician or surgeon, and servants."

(1) 12 C. & F. 520. (2) 1 Chit. 700.

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Therefore, whether, the appointment be made under the Act of George, or the Local Government Act, the electing or appointing body is given the power of "removal" of the officer. In the Act of George it will be remarked that the surgeon, for purposes of election and removal, is placed in the same category as the "servants" of the institution, who of course would be removable at the pleasure of the governors. In the Local Government Act "office" is interpreted as including "any office, situation, or employment, and the expression officer is to be construed accordingly." Therefore the surgeon again finds himself bracketed, for purposes of appointment and removal, with all other officers of the infirmary. No doubt he has important duties of a public nature to perform, but that circumstance cannot absolutely determine the question of the tenure of the office, though, if there were a doubt upon the language of the statute, it would afford an argument for the office being a substantive one. Our only duty is to construe the statute; and there would be no inconsistency in our holding that, though the duties of the office were of a public nature, the tenure of the office was at will. The office cannot be said even to be an ancient one, for it dates only from the year 1765, and it is not immaterial to observe that the cases, which are relied upon as constituting a long and uniform stream of authority in favour of the granting of the writ, date from so late a year as 1872. In my opinion, the power of removal expressly given by the Act is a clear indication that the office cannot be regarded as a permanent one. The existence of such a power has determined the tenure of offices in several cases. In *Reg.* v. *Petticrew* (1), where there was a power of removal, the late Chief Justice May and O'Brien, J., held that the office of clerk to town commissioners was held at pleasure, and they refused a *quo warranto*. In *Reg.* v. *Bayly* (2), which was the case of a secretary to a grand jury, who had express power to remove him, it was again held that the tenure of the office was at will, the Court on that occasion consisting of Johnson, Holmes, Gibson, and Madden, JJ. Furthermore, in none of the cases that have been relied on as being authorities for the issue of the writ in relation to this very office,

(1) 18 L. R. Ir. 342. (2) [1898] 2 Ir. R. 335.

has any Judge been found to express an opinion that it is held otherwise than at will. *Reg.* v. *Neligan* (1) is a decision on the precise point. The Queen's Bench Division, consisting of May, C. J., O'Brien, J., and Johnson, J., decided that the office was held at will. In *Reg.* v. *Governors of Galway Infirmary* (2), O'Brien, J., expressed the opinion that it was held at pleasure, while Harrison and Holmes, JJ., abstain from giving a decision on the point. In *Reg.* v. *Auchinleck* (3) Gibson, J., while then expressing no opinion on the point, remarked that it should not be assumed as certain that the surgeon was removable only for cause—while in *Bayly's Case* (4), which I have already mentioned, he treats *Neligan's Case* (1) as a conclusive decision. In my opinion, that case is an express decision on the question; but, if there were any doubt as to its effect, I should hold, apart from authority, that the tenure of the office, on the true construction of the statute, is during pleasure only.

But the relator strongly pressed us with the circumstance that in three cases at least the writ had been granted by this Court, and contended that it was now too late to run counter to what was alleged to be a binding current of authority. Certain observations of O'Brien and Holmes, JJ., in the *Galway Infirmary Case* (2) were also relied on as indicating that this Court was precluded by decisions of its own from now refusing the writ. I think, however, that, when the cases are examined, they cannot be at all pushed to this extreme. No one of them can, in my opinion, be regarded as a conclusive authority in a case like the present, where the net point of the nature of the tenure of the office is presented for decision. In *Alton's Case* (5), *Neligan's Case* (1), and the *Galway Infirmary Case* (2) the writ no doubt issued. But under what circumstances? In *Alton's Case* (5) the question of tenure was not discussed either in the argument or in the judgment of the Court, and *Darley* v. *The Queen* (6) was not cited. In *Neligan's Case* (1) the question of tenure was discussed and decided, but not in connection with the right to the writ, and again, *Darley* v. *The Queen* (6) was not mentioned. In

(1) 14 L. R. Ir. 149.
(2) 24 L. R. Ir. 210.
(3) 28 L. R. Ir. 404.
(4) [1898] 2 Ir. R. 335.
(5) Ir. R. 6 C. L. 256.
(6) 12 C. & F. 520.

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Kenny, J.

the *Galway Infirmary Case* (1) the question before the Court was *mandamus*, as supplemental and auxiliary to a *quo warranto*, which had already issued, and on which there had been judgment of ouster. As Holmes, J., observes in *Reg.* v. *Bayly* (2) the objection in the *Galway Infirmary Case* (1) would have come too late, inasmuch as the proceedings on the *quo warranto* had terminated. We do not know whether any cause was shown in the *Galway Infirmary Case* (1) against the conditional order for the *quo warranto*, or whether there was any argument before it was made absolute. These cases cannot, in my opinion, be regarded as binding authorities for the granting of the writ, and there is no real stream of conclusive decisions. If so, we must act on our own construction of the Act of Parliament. No doubt in *Bayly's Case* (2) Holmes, J., suggested that occasions might arise where, though the office was held at pleasure, the remedy by *quo warranto* might be appropriate and useful. It is unnecessary for us to decide that question; but I desire to guard myself against being thought to give any assent to this proposition. The principle laid down in *Darley* v. *The Queen* (3) must in the present case govern this Court; and once the office is determined to be one that is clearly held during the pleasure of the appointers, it seems to me that we are precluded from allowing the writ to issue for the purpose of testing the validity of an appointment or a removal.

On both grounds, I think the conditional order should be discharged. I shall only add that, having regard to the circumstances under which the relator is alleged to have been removed, I would have been willing to grant the writ in order that the question of the *bona fides* of the removal might be tried, but for the conclusions at which I have arrived on the other questions.

Solicitor for applicant: *Deverell.*
Solicitors for respondent: *Browne & M'Cann.*
Solicitor for the Queen's County Infirmary: *Turpin.*

A. E. R. J.

(1) 24 L. R. Ir. 210. (2) [1898] 2 I. R. 335. (3) 12 C. & F. 520.

MACCABE *v.* JOYNT (1).

(1898. No. 10,811.)

Q. B. Div. 1900. Feb. 18, 26.

Libel—Privilege—Acts done in the course of justice—Irregular registration of a Chancery order as a judgment—Action "pending."

A sued B for damages in the Vice-Chancellor's Court; and, at the hearing, upon a consent being entered into between the parties, the Court ordered the consent to be received, and that all further proceedings in the action should be "stayed on the terms therein mentioned," viz. that B should pay to A the sum of £327 forthwith, and costs of suit when taxed and ascertained; that on payment of said sums all further proceedings be stayed, and that, in default, A should be at liberty to issue execution. B paid the £327, but the costs being still due but untaxed, A's solicitor, treating this order as a "judgment," applied for an office copy of same, caused it to be entered in the Records and Writs Office as a judgment, obtained the certificate or memorandum of the officer of that department, and thereupon caused the order to be registered as a judgment against the defendant in the Judgments Registry Office. The Vice-Chancellor having set aside the entry, in the Records and Writs Office, of the order, as a judgment, and its registration, as irregular, B sued A for libel. On new trial motion:—

Held, that the publications complained of, viz. the handing of the draft memorandum to the officer of the Records and Writs Office for authentication by him, and the handing of the same document, so authenticated, to the Registrar of Judgments for registration—were privileged, as being steps taken, however irregularly, in the course of judicial proceedings; and *held*, further, that the fact of "further proceedings being stayed" did not affect the defendant's privilege.

Kennedy v. *Hilliard* (10 Ir. C. L. R. 195) followed.

NEW TRIAL MOTION.

This was an action brought to recover damages, laid at £5000, for maliciously causing judgment to be entered and registered against the plaintiff, and for libel.

The defendant had sued the plaintiff and another (Bulger) in the Vice-Chancellor's Court for damages for fraudulent mis-

(1) Before PALLES, C.B., and ANDREWS and BOYD, JJ.

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representation in connexion with the flotation of a limited liability company, and on the day fixed for the hearing of the cause (8th June, 1898), the case being called, and the pleadings opened, a consent was entered into between the parties, which was received by the Court and an order made thereon on the following terms:—

> "This action coming on for trial . . . upon opening of the matter and upon hearing what was alleged by said counsel respectively, who stated that the parties had agreed to the terms of a consent settling this action, and upon reading the said consent, dated the 1st day of June, 1898, signed by the plaintiff and the defendants and their respective solicitors, this Court doth order that the said consent (a copy of which is hereto annexed) be and the same is hereby received, and that all further proceedings in this action be stayed on the terms therein mentioned. . . ."

COPY CONSENT REFERRED TO.

> "It is hereby consented and agreed by and between the parties hereto, testified by their signatures and those of their respective solicitors,
>
> "That the defendants pay to the plaintiff the sum of £327 14*s.* 7*d.*, in full discharge of all matters sued on in this action within one week from this date.
>
> "2. That the defendants pay the plaintiff's costs, taxed and ascertained between party and party, within one week from date of Taxing Master's certificate.
>
> "3. That said costs be referred to the Taxing Master to be taxed on the higher scale.
>
> "4. That on payment of the said sums within the times limited herein all further proceedings in this action be stayed, and that the plaintiff execute a transfer to the defendants of the fifty shares he now holds in the Components Tube Company, Limited.
>
> "5. That in default of payment of debt or costs within the times limited herein plaintiff issue execution for same without further notice.
>
> "6. That this consent be made a Rule of Court at the time fixed for the hearing of this action."

The defendants, on the following day (9th June), paid the sum of £327 14*s.* 7*d.* to Joynt's solicitor, leaving the costs (untaxed) still due. Joynt's solicitor applied for a copy of this order as "a judgment," and obtained an attested or office copy endorsed as a "judgment" of the Court; and, on the 29th June, brought the attested copy of the order of the 8th to the Record and Writ Office,

with the necessary forms filled up, for the purpose of obtaining the memorandum or certificate of the official of that department of the entry of "the judgment," with a view to its registration as a judgment in the office for the registration of judgments. Having obtained the memorandum or certificate, Joynt's solicitor brought same to the Judgments Registry Office, and (after some discussion, as there was but one precedent known for such registration of a Chancery judgment) caused the same to be registered as an ordinary common-law judgment would be.

The "judgment" appeared in *Stubbs' Mercantile Gazette*, and in two others during the following week. No intimation was given to the officers that the £327 had been paid, and the only notice the defendants received of the entry and registration of the order as a judgment was a letter dated 30th June, 1898, from Joynt's solicitor informing them of the registration so as to allow of their inserting a note in the trades gazettes that the debt had been discharged. Joynt was not aware at the time of what had been done by his solicitor. Subsequently, upon a motion instituted by both defendants, the Vice-Chancellor ordered "that the entry of such order as a judgment in the cause book kept by the Clerk of the Records and Writs be vacated, as also the entry thereof in the books of the Registry of Judgments Office," with costs; see the report of this motion, *Joynt* v. *Mac Cabe* (1).

MacCabe now sued Joynt for maliciously entering judgment and for maliciously causing judgment to be registered against him, and for libel.

The statement of claim, after alleging (paragraph 1) that the plaintiff was proprietor of a newspaper called *The Irish Field*, of large circulation and a favourite medium of advertisement, continued as follows:—

"2. The defendant maliciously, and without reasonable and probable cause, signed judgment against the plaintiff for £327 14*s.* 7*d.*, for debt and damages and costs (unascertained) on the said 29th day of June, 1898, and caused and procured the said judgment to be registered in the Office for Registering Judgments in Ireland. At the date of the defendant's marking said judgment against the plaintiff as aforesaid, the said sum of £327 14*s.* 7*d.* had long since

(1) [1899] 1 I. R. 104.

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been paid and satisfied by the plaintiff and one Daniel Delaney Bulger, and at the date of the marking of the said judgment no sum was due by the plaintiff to the defendant for debt or damages.

Par. 3 was also, in libel, to the same effect as par. 2, with variations immaterial to be stated.

"4. The defendant falsely and maliciously wrote and published, or caused or procured to be written and published, of and concerning the plaintiff, the words following:—

Name of Defendant or Person whose Estate is intended to be affected thereby.	Usual or last known place of abode of such person.	Title, Trade, or Profession of such person.
Frederick Faber MacCabe, ..	Belville, Donnybrook, Co. Dublin,	Bachelor of Medicine.

High Court of Justice in Ireland, Chancery Division, Vice-Chancellor.

Date of Judgment, June 8th, 1898.

Amount of Debt or Damages, £327 14*s.* 7*d.*

Amount of Costs, Unascertained.

Name of the Plaintiff.	Usual or last known place of abode of such person.	Title, Trade, or Profession of such person.
Alfred Lane Joynt, ...	62, Upper Mount-street, City of Dublin,	Solicitor.

The judgment described in the foregoing memorandum was registered in the Office of Registration of Judgments on the 29th June, 1898, and is contained in Book 38, page 476.

"5. The defendant falsely and maliciously wrote and published, or caused or procured to be written and published, of and concerning the plaintiff, the words following—[setting out the same words], meaning thereby that the plaintiff was unable to discharge his legal obligations.

"6. The defendants falsely and maliciously wrote and published, or caused or procured to be written and published, of and concerning the plaintiff the following words—[setting out the words as before] . . . meaning thereby that the defendant had, on the 8th day of June, 1898, in the Court of the Right Honorable the Vice-Chancellor of Ireland, recovered a judgment against

the plaintiff and one Daniel Delaney Bulger, for a sum of £327 14*s.* 7*d.*, for debt and damages, besides an unascertained sum for costs, and that the said principal sum of £327 14*s.* 7*d.* was on the 29th day of June, 1898, due and owing by the plaintiff and said Daniel Delaney Bulger, to the defendant, and that same was an existing liability against the plaintiff's estate and effects.

"7. By reason of the matters and facts alleged in the foregoing paragraphs of the statement of claim, the plaintiff was seriously injured, in his character, reputation, and business as a newepaper proprietor, and as a result of the defendant's marking such judgment as aforesaid, the plaintiff's receipts and income as the proprietor of said newspaper were greatly diminished, and the circulation of plaintiff's newspaper also declined as a result of the defendant's said action, and the plaintiff was put to costs and expense in having said judgment set aside."

The plaintiff claimed £5000 damages, giving as particulars of special damage, "to loss sustained by plaintiff owing to falling off of orders and receipts from advertisements in plaintiff's said newspaper, and by reason of the diminution of the circulation of plaintiff's newspaper, £2000."

The defence, after traverses of the causes of action for maliciously procuring the entry, &c., of the order as a judgment, and for libel, and after a plea of "no libel" continued:—

"9. As a further defence to the cause of action comprised in paragraphs 2 and 3 of the plaintiff's statement of claim, and separately as a further defence to the cause of action contained in paragraphs 4, 5, and 6 thereof, the defendant says that on the 8th day of June, 1898, he obtained in the High Court of Justice (Chancery Division, in the Court of the Right Honorable the Vice-Chancellor) an order for the payment of (and whereby there became payable to the defendant the sum of) £327 14*s.* 7*d.* for debt and damages, and for costs (unascertained) by the plaintiff and one Daniel Delaney Bulger; that the said sum of £327 14*s.* 7*d.* was subsequently, on or about the 9th day of June, 1898, paid by the plaintiff and the said Daniel Delaney Bulger, or one of them, to the defendant, leaving the said order so far as regarded costs still unsatisfied; that the said order was made up by the officer of the said Court as a judgment of the Court, and as such, a copy thereof was issued by the officer of the said Court to the defendant or his solicitor acting as his agent; that thereupon the defendant, through his solicitor, acting in good faith and without malice, with reasonable and probable cause and believing the said order to be a judgment, or equivalent to and having the same effect as a judgment, produced the said copy order, so described as a judgment, to the Clerk of the Records and Writs Office (being an officer of the High Court) together with a minute or memorandum of the particulars of the said order, therein described as a judgment, for the purpose of obtaining the certificate thereon of the said officer in regard thereto

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as prescribed by statute, which certificate the said officer thereupon gave having made an entry of the date of said order in the books of said division; that thereupon the defendant, through his solicitor, acting as aforesaid, brought and produced the said certificate, with such minute or memorandum attached thereto, to the Registrar of Judgments (being also an officer of the said High Court), and that thereupon the said Registrar entered the particulars of said order, described as a judgment, in the books kept by him, in manner prescribed by statute—which things, or some of them, are the matters complained of in paragraphs 2 and 3 of the statement of claim, and the writing and publication complained of in paragraphs 4, 5, and 6 thereof.

"10. Repeating, for brevity, the statements in the 9th paragraph hereof contained, the defendant says that all said matters and the writing and publication (if any) complained of in the statement of claim, were the acts, not of the defendant nor of anyone acting on his behalf, but the acts of an officer of the High Court in the performance of a duty imposed by statute, and acts in Court and in the course of justice and judicial proceedings, and privileged accordingly.

"11. Repeating, for brevity, the statements contained in the 9th paragraph hereof, the defendant says that all things done, and the writing and publication (if any) by the defendant or his solicitor, or anyone acting on his behalf, of or in regard to the matters complained of, were acts done in Court, in the course of justice and judicial proceedings, in good faith and without malice, with reasonable and probable cause, and for the protection of the defendant's interests, under such circumstances as rendered the acts complained of and such writing and publication (if any) a privileged communication.

"12. Repeating, for brevity, the statements in the 9th and 10th paragraphs hereof contained, the defendant says that all things done, and the writing and publication (if any) by the defendant or his solicitor, or anyone acting on his behalf, of or in regard to the matters complained of, and all things done, and steps taken, under the said order, for the purpose of obtaining a certificate of the existence thereof as a judgment (or order of the Court equivalent to and having the effect of a judgment), and for the purpose of registering the same in the Registry of Judgments, were acts done and steps taken, duly and regularly, in the course of justice and judicial proceedings, in good faith and without malice, with reasonable and probable cause, for the protection of the defendant's interests, under such circumstances as rendered the acts complained of and such writing and publication (if any) a privileged communication.

"13. Repeating, for brevity, the statements in the 9th and 10th paragraphs hereof contained, the defendant says that, admitting for the purposes of this plea, but no further or otherwise, that the said order was not duly or properly entered as a judgment in said Record and Writs Office, or the certificate thereof duly or properly given to the defendant or his agent, and that the said order was not duly or properly registered in the said office for the registration of judgments; yet the writing and publication (if any) complained of, and all

things done by the defendant or in his behalf, in the premises, were acts done and steps taken in Court and in the course of justice and judicial proceedings, in good faith and without malice, with reasonable and probable cause, in protection of the defendant's interests, under circumstances that rendered the acts complained of and such writing and publication (if any) a privileged communication."

The action was tried before the Lord Chief Justice and a Special Jury of the City of Dublin in June, 1899, the evidence produced being substantially to the effect above set out. The plaintiff (on notice) asked leave to amend by pleading further special damages, viz.: loss on the sale of the newspaper, but the learned Lord Chief Justice refused to allow the amendment.

At the close of the plaintiff's case, counsel for the defendant asked for a nonsuit on the grounds following:—

"That there is no evidence of malice;—that there is no evidence of the absence of reasonable or probable cause;—that (as to the counts for maliciously causing judgment to be entered and registered) there is no evidence of loss or damage to the plaintiff flowing from the alleged acts of the defendant;—that as to the counts for libel, there is no evidence of actionable publication by the defendant, or by anyone on his behalf or at his request;—that (as to both causes of action) the acts and matters complained of in or in relation to the action of *Lane Joynt* v. *Mac Cabe and Bulger*, were regular and unimpeachable, and the order of the 8th June, 1898, regularly and properly entered and registered, as a judgment or order equivalent to and having the same effect as a judgment (1), (*a*) whether such acts and matters be considered as done and carried out by an officer of the High Court in pursuance of his duty as such officer, or (*b*) by or at the request of the defendant as a party to that suit;—that, admitting that the said order was irregularly or improperly entered and registered as a judgment, or order equivalent to and having the same effect as a judgment, the acts and matters complained of were done and carried out, not by the defendant or anyone on his behalf, but by an officer of the High Court, for none of which the defendant can be held responsible in this action; (2) that admitting that the said order was irregularly and improperly entered and registered as a judgment or order equivalent to and having the same effect as a judgment, and that the acts and matter complained of were done and carried

(1) Citing 3 & 4 Vict. c. 105, ss. 27, 28; 7 & 8 Vict. c. 90, s. 22; 37 & 38 Vict. c. 96; 55 & 56 Vict. c. 19 (amending sections 27 and 28 of 3 & 4 Vict. c. 105); and sections 335 and 336 of the Bankruptcy Act, 1857.

(2) *M'Laughlin* v. *Doey* (32 L. R. Ir. 518); *Kennedy* v. *Hilliard* (10 Ir. C. L. R. 195).

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out, or the doing or effecting thereof procured by the defendant or anyone on his behalf, the same were acts and matters in Court, and in the course of justice and of judicial proceedings and (as to the counts for libel) absolutely privileged, and (as to the counts for maliciously procuring the entry and registration of said order as a judgment) disclosing no legal cause of action, there being no evidence of (*a*) malice in fact, (*b*) absence of reasonable and probable cause, and (*c*) special damage resulting therefrom to the plaintiff.

This application was refused, and, evidence for the defence having been given, his Lordship left to the jury the following question:—

"1. Was the defendant actuated by malice?—(*Answer*, No). 2. Did the defendant believe he was entitled to register the order as he did?—(*Answer*, Yes). 3. Had he reasonable grounds for such belief?—(*Answer*, Yes). 4. Did the plaintiff sustain actual damage?—(*Answer*, No). 5. Is the document complained of a libel?—(*Answer*, Yes). 6. In publishing the alleged libel was the defendant actuated by malice?—(*Answer*, No). 7. What damages do you award to the plaintiff if any?—(*Answer*, £5, on the libel paragraphs).

Upon these answers the jury by direction found for the plaintiff on the libel counts with £5 damages; and for the defendant on the other cause of action.

His Lordship reported that counsel for the plaintiff had asked him to direct the jury that in assessing damages on the libel counts they could take into consideration damage resulting from the publication of the "judgment" in the gazettes; but that he had declined under the circumstances of the case, to do so. He gave judgment for the defendant on the first cause of action with costs (with stay of execution), and, as regarded the counts for libel, abstained from giving judgment but reserved liberty to both parties to apply to the Divisional Court.

The plaintiff now moved for judgment on both causes of action or for a new trial on the ground of misdirection by the learned Judge in directing the jury not to take into consideration *Stubbs' Gazette*, *Kemp's Gazette*, and the *Commercial Gazette*, commonly called the "Black List," in estimating the amount of damages to which the plaintiff was entitled by reason of the libel complained of, and on the ground that the learned Judge was wrong in law in directing the jury to leave out of consideration the said "Black Lists" in estimating the damages to which the plaintiff was

entitled, and on the further ground that the learned Judge was wrong in rejecting the evidence of special damage tendered by plaintiff arising from loss of sale of plaintiff's paper, and that the findings of the jury upon the questions Nos. 1, 2, 3, 4, and 6 left to them by the learned Judge were against evidence and the weight of evidence and were unsatisfactory and perverse.

The defendant, on cross-notice, applied for an order (in regard to the cause of action for libel contained in the plaintiff's statement of claim) that verdict and judgment with costs be entered for him upon the findings of the jury, and alternatively notwithstanding said findings, upon the grounds following, that the learned Judge should have directed a verdict for the defendant;—that in their natural meaning the words complained of were not libellous; that there was no evidence of actionable publication by the defendant, or by anyone on his behalf, or at his request of, the alleged libel; that the matters and proceedings complained of in relation to the action of *Joynt* v. *MacCabe and Bulger* were regular and unimpeachable, and the order of the 8th June, 1898, regularly and properly entered and registered as a judgment or order equivalent to and having the same effect as a judgment (*a*) whether such matters or proceedings be considered as done and carried out by an officer of the High Court in pursuance of his duty as such officer, or (*b*) by or at the request of the defendant as a party to that suit—that admitting that the said order was irregularly or improperly entered and registered as a judgment or order equivalent to and having the same effect as a judgment, the matters and proceedings complained of were done and carried out, not by the defendant or anyone on his behalf, but by an officer of the High Court, for none of which the defendant could be held responsible in an action of libel—that, admitting that the said order was irregularly or improperly entered and registered as a judgment or order equivalent to and having the same effect as a judgment, and that the acts and matters complained of were done and carried out, or the doing or effecting thereof procured, by the defendant or anyone on his behalf, the same were absolutely privileged, or privileged in the absence of proof of malice in fact (which the jury had negatived) and upon the ground that the finding of libel was against the weight of evidence.

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S. Bushe, Q.C., and *Ignatius O'Brien, Q.C.* (*Jefferson* with them), for the plaintiff:—

As to the counts for libel, the plea of privilege cannot be sustained. The defendant's action was wholly irregular; and, as was decided by the Vice-Chancellor, see *Joynt* v. *Mac Cabe* (1); outside the ordinary "course of justice." There was a complete cause of action for libel *before* the entry in the cause book. Till then the document filled in by the defendant through his solicitor was without any privilege. Had the officer refused to enter the order or to give his certificate, that defence would not have been open; and the officer might have refused to make the entry, for there was no judgment, nor order for payment of money, capable of registration. If there had been such a judgment or order, the defendant would no doubt be protected by the authority of decided cases, such as *Kennedy* v. *Hilliard* (2), *Annaly* v. *Trade Auxiliary Co.* (3), and *M'Laughlin* v. *Doey* (4); but here the Court had merely "received" the consent and had "stayed" all further proceedings. That was a complete stay of the suit; no proceedings were pending thenceforward; and the "course of justice" relied upon had therefore no existence.

[Counsel also argued that the finding of no malice was against evidence; and that in assessing damages the jury were entitled to consider the publication in the black list. *Blair* v. *Kinch* (5).]

O'Shaughnessy, Q.C., and *Redmond Barry, Q.C.* (*Albert Lane Joynt* with them), for the defendant:—

As to maliciously procuring, &c., it is needless to go beyond the finding of the jury.

As to the alleged libel, the defendant is entitled to succeed upon the plea of absolute privilege, even assuming him answerable for his agent's acts done without his knowledge. It must be conceded in this Court that the decision of the Vice-Chancellor was correct, but, as to this, see 3 & 4 Vict. c. 105, ss. 27, 28; 7 & 8 Vict. c. 90, s. 22; 37 & 38 Vict. c. 96; 55 & 56 Vict. c. 19 (S.L.R. Act, 1892),

(1) [1899] 1 I. R. 104.
(2) 10 Ir. C. L. R. 195.
(3) 26 L. R. Ir. 25.
(4) 32 L. R. Ir. 518.
(5) 10 L. R. Ir. 234.

and the Bankruptcy Act, 1857, sections 335 and 336. It must also be here assumed that the action of the defendant's solicitor was irregular and wrong; but none the less the steps taken were taken in the course of a judicial proceeding, under legal advice, to guard against the loss of the costs payable under the order of the 8th June: see the Bankruptcy Act, 1857, ss. 335 and 336. In all the cases where "the course of justice" has been held to be a good defence to a claim for libel, the matters complained of have been the doing of something incorrect or irregular, marking judgment irregularly, *M'Laughlin* v. *Doey* (1); filing a scandalous affidavit, *Kennedy* v. *Hilliard* (2); perjury, *Hodgson* v. *Scarlett* (3); &c. See, too, *Annaly* v. *Trade Auxiliary Co.* (4); *Cosgrave* v. *Trade Auxiliary Co.* (5). In proceedings regular in every particular there would be no conceivable possibility of raising any question of "privilege."

Cur. adv. vult.

The judgment of the Court was delivered by

PALLES, C. B.:—

Feb. 26.

We intimated, during the argument, that we saw no reason to disturb the finding of the jury upon the question of malice. It follows that the verdict directed by the Lord Chief Justice for the defendant, on the causes of action for maliciously, and without reasonable and probable cause, signing and registering judgment against the plaintiff, must stand.

The remaining causes of action are in libel. The only defence to them material to consider is, in substance, that the alleged defamatory publications were acts done in "the course of justice."

The publications are two:—1, the handing, by Mr. Doyle, the defendant's solicitor, to the proper officer in the office of Records and Writs, for the purpose of obtaining his authentication thereof, under 11 & 12 Vict. c. 120, s. 12, such a minute or memorandum of the particulars of an order of the Vice-Chancellor of the 8th June, 1898, as would have been necessary to procure

(1) 32 L. R. Ir. 518.
(2) 10 Ir. C. L. R. 195.
(3) 1 B. & Ald. 232.
(4) 26 L. R. Ir. 25.
(5) Ir. R. 8 C. L. 349.

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the registration of such order, had the order been a "decree" or "order" within 3 & 4 Vict. c. 105, s. 27; 2, the handing by the same solicitor of the same minute or memorandum when authenticated by the signature of the Clerk of Records and Writs, to the Registrar of Judgments. Each of these acts was one which, having regard to the 20 & 21 Vict. c. 60, s. 336, would have been proper to have been done, in order to safeguard the rights of the present defendant, in reference to the costs mentioned in that order, had the order been one within the section I have mentioned. It is admitted that, had the order been of that character, the acts would not have been actionable, as in that case they would undoubtedly have been "in the course of justice." The order, however, was not within the meaning of the above section, therefore there was no order capable of registration. This is the first ground advanced by the plaintiff in support of his contention that the action will lie.

The second ground relied upon was: that as the order of the Vice-Chancellor directed the action to be stayed, there was not at the time of the irregular registration, any action pending in the High Court.

The arguments in support of the first ground relied upon can be answered by simply defining the subject-matter which is within the protection afforded by the common law to words spoken or written "in the course of justice."

In the first place, it is clear that this protection is not limited to words spoken or written in due and regular course of justice: *Kennedy* v. *Hilliard* (1), *Henderson* v. *Broomhead* (2). So, too, is it settled by the same cases, and by the numerous old authorities elaborately considered in the judgment in the former case, that it is not sufficient, to take words out of the protection, that they are false and malicious.

What, then, is the precise rule? The most accurate, as well as the most authoritative, statement of it that I am aware of, is in *Rex* v. *Skinner* (3). There Lord Mansfield says: "Neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, *for words spoken in office*." To prevent misapprehension,

(1) 10 Ir. C. L. R. 195. (2) 4 H. & N. 569. (3) Lofft. 55.

I desire to say that I do not for a moment suppose that Lord Mansfield, by thus stating the protection to be given to the party to be identical with that of the witness, the jury or the Judge, intended to ignore the well-known action for malicious prosecution; but such an action is not one for words.

To recur to the words of Lord Mansfield, I find that they are quoted, and treated as settled law, in the considered and unanimous judgment of the Exchequer Chamber in *Dawkins* v. *Lord Rokeby* (1); a judgment which, in my mind, precludes further discussion on the subject. It cannot be, and indeed is not, denied that the rule, whatever it may be, is applicable equally to words written as to words spoken. In *Kennedy* v. *Hilliard* (2), *Henderson* v. *Broomhead* (3), *Revis* v. *Smith* (4), and many of the old cases, the words complained of were in affidavits; in other cases in pleadings; and the only reason why the language of Lord Mansfield applies the rule to words spoken only is that the application before him was in respect of such spoken words.

Now, if the acts of the solicitor, Mr. Doyle, are to be imputed to the defendant, his client (as to which I say nothing), they become the acts of the defendant as a party in the action; and are thus within the protection.

The second ground has already almost been answered by anticipation, because if the rule be as I have stated, it is impossible that it can be confined to acts done pending the action. As an instance, let me take the draft of a writ of summons, afterwards issued. It may contain defamatory matter, and is plainly within the protection; yet there often must be, and indeed almost invariably is, some publication of it before the actual issuing of the writ which is the commencement of the action. But further, the rule is not founded upon any technical considerations, nor is it limited by any precise words of a statute. It rests upon broad grounds of public policy, and must be deemed to be co-extensive, with the reason of it. The principle is laid down by Pigot, C. B., in *Kennedy* v. *Hilliard* (2), in words which, though they refer to witnesses as well as to parties, I prefer to quote by their entirety

(1) L. R. 8 Q. B. 264.
(2) 10 Ir. C. L. R. 195.
(3) 4 H. & N. 569.
(4) 18 C. B. 126.

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rather than by too strict a limitation of the quotation to the words applicable to a party only, to run the risk of obscuring their sense.

"I take this," says the Chief Baron, "to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a Judge, in dealing with the matter before him, *a party in preferring or resisting a legal proceeding*, and a witness in giving evidence, oral or written, in a Court of Justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. . . . It is of far less importance that occasional mischief should be done by slander under such circumstances, than that the whole course of justice should be enfeebled and impeded. The cases must be comparatively few, though they unfortunately will sometimes occur, in which substantial injury will be done. . . . But if parties and their witnesses (and if these were not protected it would be difficult to apply a different rule for the immunity of Judges and jurors) were exposed to actions of this nature, not only would the cases be innumerable in which such actions would be brought (at least, against parties and witnesses), but, in every case, *the party* and the witness would be fettered *in seeking* or in aiding *justice*, by his own fears more or less influencing him, according to the strength or the weakness of his individual character, his position and circumstances in life, and the known wealth, obstinacy or malevolence of the party offended." Later on, in giving his reasons why the protection should be extended to everything stated in an affidavit, irrespectively of its materiality, the Chief Baron makes observations the principle of which are in my mind equally applicable to many of the mistakes which necessarily must often be made in pleadings in Courts of Justice (1). "If a party," he says, "in making in person (as he may) a pleading or a statement of his own case in a Court of Justice, or in making an affidavit to sustain it, or if a witness (whether a party to the proceeding or not) shall be bound to determine, first, what are the exact questions at issue in the cause, and next, what is the exact line at which statement or evidence shall be material, and to determine this at the peril of an

(1) 10 Ir. C. L. R. 211.

action for defamation if he be wrong and if his words be defamatory, the protection which the law professes to give him would be nearly nugatory for its purpose. That purpose is, to give him the courage *to resort as a party to the legal tribunals for justice*, or, as a witness, to give his evidence before those tribunals, undeterred by the fear of a prosecution or an action. It is impossible that he can be free from that fear, if his immunity must depend upon his not mistaking what is not material for what is, and upon his rightly distinguishing what *is* from what *is not* libel or actionable slander."

The principle underlying the passages I have read applies to the present case. To coerce a party who has obtained, as did the defendant here, an order conferring upon him certain rights, which, if the order bore a certain construction, might be rendered inoperative by non-registration, to determine, at the risk of an action, whether it was or was not an "order" within the meaning of a particular section of an Act of Parliament, or whether its effect was or was not to determine the cause, and prevent it continuing to be a pending action, would be as much against the policy of the law as would be the instances referred to by my learned predecessor.

I have made these observations in reference to the second ground on which it has been suggested that this action is maintainable, in order that the further answer I am about to give to that argument may not hereafter be cited, as indicating by implication any opinion upon my part that the protection is confined to acts done during the continuance of the action.

Accordingly I have then, to express my opinion that, as the stay of proceedings in the present case was conditional on the performance of certain terms, one of which remained unperformed at the time of the registration, the action was one which, in a possible event, the non-performance of the condition, might thereafter have been effectively proceeded with, and therefore continued to be pending; further, that even had the stay been an absolute one I should still have held that the action did not cease to be pending, in the sense contended for, as the order did not direct the writ by which it was instituted should be quashed. All the acts complained of were connected with and incidental to acts in Court.

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Upon the whole, I am clearly of opinion that the causes of action in question are absolutely devoid of foundation, and that the verdict and judgment upon them should be entered for the defendant, with costs.

Andrews, J.:—

I entirely concur in the judgment of the Lord Chief Baron.

Boyd, J.:—

And I also.

Solicitor for plaintiff: *W. J. Shannon.*
Solicitor for defendant: *D. S. Doyle.*

J. H. P.

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REG. (M'GRATH) *v.* CHAIRMAN AND JUSTICES OF COUNTY WICKLOW (1).

Summary jurisdiction—Appeal to Quarter Sessions—Practice—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *sect.* 52—*Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *sect.* 269.

The 52nd section of the Licensing Act, 1872, is an independent appeal procedure, complete in itself. Sect. 24 of the Petty Sessions (Ireland) Act, 1851, does not apply to such appeals.

So also, in appeals under the Public Health (Ireland) Act, 1878, a complete procedure is provided by sect. 269.

Certiorari.

This was a motion on behalf of the prosecutor at Petty Sessions to discharge, with costs, a conditional order for writs of *certiorari* and *mandamus* obtained by M'Grath—a *certiorari* to remove and quash an order of the Wicklow Quarter Sessions, made on the 25th January, 1900, entering "no rule" upon, or refusing to hear, the appeal there entered on M'Grath's behalf against an order of Petty Sessions convicting him in £1 5*s.* and costs,

(1) Before Sir P. O'Brien, L.C.J., and Gibson and Kenny, JJ.

and directing imprisonment in case of default, upon a charge of selling intoxicating liquor at a time prohibited by law; and *mandamus* to compel the rehearing of the appeal. M'Grath, being convicted, had appealed to the Chairman and Justices at Quarter Sessions, where, when the case came on for hearing, the solicitor for the complainant objected that the seven days' notice of intention to prosecute the appeal required by sect. 24, sub-sect. 5, of the Petty Sessions (Ireland) Act had not been served, and that the appeal could not be entertained. Counsel for M'Grath contended that this section did not apply to appeals taken under the Licensing Acts. The Bench held that the objection was a good one, and made "no rule" on the appeal. The requirements as to appeal contained in the Licensing Act, 1872, sect. 52, had been complied with.

Morphy, for the complainant below, now moved to discharge the conditional order. He contended that an appellant from an order of conviction made at Petty Sessions under the Licensing Acts must comply not only with the provisions of the Licensing Act, 1872, sect. 52, but with those of the Petty Sessions Act, 1851, sect. 24, sub-sect. 5. The two enactments must be read together and "harmonized": see per Johnson, J., in *Reg.* (*Clarke*) v. *Justices of Co. Wicklow* (1). He also cited *Ex parte Curtis* (2), in which, he urged, the judgments of the majority of the Court, when considered, did not support the defendant's argument.

W. G. Gibson, for the defendant below:—

It would be a hardship if an appellant in such a case, who followed the steps prescribed in the Licensing Act, 1872, sect. 52, relying on the views expressed in this Court in *Reg.* (*Clarke*) v. *Justices of Wicklow* (1), should now be held to have lost his right of appeal if this Court consider those judgments open to question. The Licensing Act, 1872, sect. 52, contains an appeal code complete in itself. The procedure is in many respects different from that prescribed by the Petty Sessions Act; and having regard to

(1) 30 L. R. Ir. 465. (2) 3 Q. B. D. 13.

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the case (unreported) in this Court of *Reg.* (*Lyster*) v. *Justices of Queen's County* (1), the point is hardly open to discussion.

The Court records of *Lyster's Case* (1) having been referred to, fully supporting counsel's statement of the matter, *Morphy* conceded that the question was no longer open.

SIR P. O'BRIEN, L. C. J. :—

In this case we are all of opinion that we should follow *Lyster's Case* (1), which, as Mr. Morphy now rightly concedes, governs the present. That case was decided by May, C. J., and Lawson and O'Brien, JJ. Apart from that authority, I should have had no doubt upon the matter. To my mind the 52nd section of the Licensing Act, 1872, is independent of section 24 of the Petty Sessions Act of 1851, and its provisions in regard to appeals are independent, exhaustive, and exclusive. However, *Lyster's Case* (1) is exactly in point, and Mr. Morphy must fail.

GIBSON, J. .—

Sect. 52 supplies an appeal procedure complete in itself, subsect. 2 replacing sub-sects. 1 and 5 of sect. 24 of the Petty Sessions Act. This latter section contains wholly different appeal provisions. The case of *Reg.* (*Lyster*) v. *Justices of Queen's County* (1), decided on sect. 269 of the Public Health Act, is conclusive that the notice prescribed by sect. 24, sub-sect. 5, is wholly inapplicable.

This last case also decided the point raised in *Clarke's Case* (2), that notice of appeal can be served on the Petty Sessions Clerk

(1) In *Lyster's Case* (Q. B. D. 28th May, 1886), which counsel cited *ex relatione Sandford*, a conditional order for *certiorari* and *mandamus* had been obtained to quash the ruling of the Chairman of Quarter Sessions, De Moleyns, Q.C., upon an appeal under sect. 269 of the Public Health Act, 1878. The learned Chairman had there ruled service of the notice on the Clerk of Petty Sessions good service, but had declined to entertain the appeal, on the ground that the seven days' notice of intention to prosecute (under the Petty Sessions Act, sect. 24 (5), had not been served. The Divisional Court refused respondents' motion to discharge the conditional order, and made absolute the order for the issue of the writs.

(2) 30 L. R. Ir. 465.

for and on behalf of the Justices. But for certain English cases by which I thought myself bound, I would have probably come to the same conclusion. We must follow the previous decisions; they are convenient, though the reasons assigned for the judgments in *Clarke's Case* (1) are inconsistent, and I do not quite follow the way the result was arrived at.

KENNY, J. :—

I agree.

Solicitor for the complainant: *J. Hill Major.*
Solicitor for the defendant: *J. H. M'Carroll.*

A. E. R. J.

REG. (M'KENNEY) *v.* JUSTICES OF CO. ANTRIM (2).

Licensing Acts—Licence—Application for certificate for spirit grocer's licence —Absence of objection by police—Evidence taken by magistrates as to the unfitness of the applicant—Refusal to grant a certificate as to the good character of the applicant—Mandamus—*Effective alternative remedy by appeal*—Certiorari.

M. applied to the magistrates at Petty Sessions for a certificate as to his good character and the suitability of his premises, to enable him to obtain a spirit grocer's licence. There was no objection by the police to the application. Two of the presiding magistrates retired from the Bench, and gave evidence of intoxication on the part of M. Acting on this evidence, and also on the evidence of another magistrate who happened to be in Court, though not on the Bench, the remaining presiding magistrates refused to grant the applicant a certificate of good character. The applicant's solicitor at Petty Sessions objected that it was not competent for magistrates to give up their positions on the Bench and become witnesses, but raised no point as to the absence of objection by the police. The applicant having moved the Queen's Bench Division for *mandamus* and *certiorari*, to compel the magistrates to grant him the certificate :—

Held, by Sir P. O'Brien, L.C.J., and Gibson, J., that there was no juris-

(1) 30 L. R. Ir. 465.

(2) In the Queen's Bench Division, before SIR P. O'BRIEN, L.C.J., and MURPHY, GIBSON, and MADDEN, JJ.

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diction given by the Licensing Acts to the magistrates enabling them to refuse a certificate of good character to an applicant seeking a spirit grocer's licence, except in cases where the police make an objection to the issue of such certificate; but that the applicant was not entitled to *mandamus*, because he had another effective remedy, viz. by appeal to Quarter Sessions.

Held, by Murphy and Madden, JJ., that a writ of *mandamus* ought not to issue to compel magistrates to give a certificate of personal character which they knew to be false.

Held, by the majority of the Court of Appeal, Walker and Holmes, L.JJ. (FitzGibbon, L.J., *dissentiente*), that in the absence of an objection by the police the magistrates had no jurisdiction to refuse the applicant a certificate as to his good character; that no appeal lay from the decision of the magistrates to Quarter Sessions, and that accordingly the writ of *mandamus* should issue.

Semble (*per* Walker, L.J.), that in cases where magistrates act without jurisdiction, or in excess of jurisdiction, even though a right of appeal may exist, *mandamus* may be granted as a more appropriate and effective remedy.

Per Fitz Gibbon, L.J., that the magistrates were not bound to give a certificate of good character, which they knew would be false, to the applicant, in the absence of objection by the police; that an appeal lay to Quarter Sessions, and afforded an adequate and effective remedy; that if the magistrates were directed to rehear the case, an objection would at once be made by the police, as would have been done at the first hearing had the point now raised been suggested by the appellant, and thus the remedy by *mandamus* would become abortive; and that for all these reasons the writ should not issue.

MANDAMUS.

This was an application to make absolute, notwithstanding cause shown, a conditional order, dated the 27th September, 1899, for a writ of *certiorari* directed to the respondent Justices to remove and quash an adjudication by them, made at the Annual Licensing Petty Sessions for the Bushmills district on the 14th September, 1899, refusing the application of Michael M'Kenney for a certificate to enable him to obtain a spirit grocer's licence in respect of certain premises in Ballantrae in that district, and for a writ of *mandamus* commanding the said Justices to enter continuances and to rehear the application: on the grounds (as to the *certiorari*) that the order of refusal was without and in excess of jurisdiction; that it was founded on no due or legal objection to the granting thereof, and upon grounds not warranted by law; and that, the only legitimate objector being the officer of police,

and there having been no objection on his part before the Court, the Justices were bound to grant the certificate.

The conditional order was obtained on the affidavit of the applicant, Patrick M'Kenney, who stated that on the 14th September, 1899, he applied to the magistrates sitting at the Annual Licensing Petty Sessions Court for the Bushmills district for a certificate (under the Beerhouses (Ireland) Act, 1864) as to his good character and as to the suitability of his premises, to enable him to obtain a spirit grocer's licence for his house in Portballantrae, in which he resided and carried on business as a grocer, and that the district inspector of police had been duly served with the notice of the application; that the application was heard by the following magistrates:—Sir Francis E. Macnaghten, Bart., chairman, Lord Macnaghten, Dr. Anthony Traill, N. Grimshaw, A. H. Steen, and James Boyle; that, at the hearing, the district inspector of police appeared, and stated to the Court that he had been duly served with notice of the application, and that, having inquired into the circumstances of the case, and being satisfied as to the applicant's good character and the suitability of his premises, he did not offer any opposition; that the applicant was examined by his solicitor in support of the application, as was also the local sergeant of police, who stated that the applicant was a man of respectability and good character, and that the witness had examined the premises and had found them to be suitable for a spirit grocer's business; that "no other evidence was then tendered to the Court, and all the said magistrates retired to their consulting-room to consider their decision;" but that "before retiring, and while the evidence in the case was proceeding and a discussion thereon going on among the members of the Court, Dr. Traill, as one of the presiding magistrates, stated that he would never sign the certificate, and that, if the other magistrates decided to do so, he would have his protest entered in the order book"; that, "on returning into Court, the Chairman, standing on the Bench and addressing the people in Court, said: 'Before the magistrates give judgment in this case, they wish to know if any person in Court wishes to offer any evidence against the application'";—that thereupon, Dr. Traill, "one of the presiding magistrates, who had heard the

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case fully and had retired to the room with the other magistrates to consult, remaining with them there all the time, came forward and said he wished to give evidence"; that, notwithstanding protest by Mr. M'Laughlin (the applicant's solicitor), Dr. Traill was allowed to give evidence, and stated he considered that the applicant was not a suitable person to have a spirit grocer's licence, as he had seen the applicant under the influence of drink; —that, when Dr. Traill had finished his evidence, another of the magistrates, Mr. Steen, who had also taken part on the Bench in the hearing of the case, and had retired with the other magistrates for consultation, volunteered to give evidence, and, notwithstanding protest, was allowed to give evidence; that Mr. Steen said he wished to corroborate what Dr. Traill had said; that one of the said magistrates then called upon Mr. Richard M. Douglas, J.P., who was sitting in Court, to come forward and give evidence, which he did at their request, to the effect that he had seen the applicant under the influence of drink; that none of these three gentlemen were cross-examined by Mr. M'Laughlin, who urged that the procedure was irregular; that none of these witnesses were called by the district inspector, who (as was submitted in the affidavit) was the only person legally entitled to oppose the application, and that "none of their evidence was given until after the hearing of the case had closed and the magistrates had retired for consultation"; that, after the proceedings above mentioned, the application was refused "on the ground" (as appeared by the certified copy of the order book) of the "unsuitability of the *applicant*."

A joint affidavit, made by Sir Francis Macnaghten and Lord Macnaghten, was filed as cause on their behalf. They deposed that, on the day in question, Mr. M'Laughlin, as solicitor on behalf of Patk. M'Kenney, applied to the magistrates at Bushmills Petty Sessions for a certificate of good character and of the suitability of his premises in order to enable him to obtain a spirit grocer's licence; that the district inspector of police (Mr. Ireland), who, however, was not examined as a witness or sworn, stated to the Bench that there was no objection on the part of the police; that Patrick M'Kenney was called by Mr. M'Laughlin, but gave no evidence on the matter now in question; that Sergeant Carson, in charge

of the police in Bushmills, was sworn, and deposed that he believed that M'Kenney was a person of good character; but did not state the ground of his belief, was not asked whether he had made any inquiry on the subject, and did not allege or suggest that he had done so; that no notice or intimation of the proposed application had been given by or on behalf of the applicant, or by or on behalf of Mr. Ireland or the police in Bushmills, to the magistrates living in the neighbourhood, or any of them; and that the application came as a complete surprise to the magistrates presiding in Petty Sessions on the 14th September, the majority of whom lived in the immediate neighbourhood of, or were frequently in, Portballantrae, and could not help being aware of the reputation for insobriety which, justly or unjustly, Patrick M'Kenney bore in the neighbourhood; that Dr. Traill, one of the presiding magistrates, asked the police sergeant whether he had seen M'Kenney intoxicated, and he said he had not; that then or shortly afterwards, Dr. Traill stated that he himself had seen M'Kenney under the influence of liquor, and that he would certainly not sign the certificate; and that, if the other magistrates decided to do so he would enter his protest in the order book; that, as a discussion as to the duties of magistrates seemed likely to arise in open Court and in the hearing of the people present, which might have been inconvenient if not unseemly, the chairman suggested that it would be better for the magistrates to retire, which they accordingly did, but that they did not retire to consider their decision, nor did they consider the case closed; that the absence of the magistrates from Court lasted about a minute or two, the difficulty which gave occasion for their retirement being removed by Dr. Traill and Mr. Steen (who both said that they had seen M'Kenney under the influence of drink) intimating that they quite agreed that it was impossible for the magistrates as a body or individually to act upon private information or personal knowledge; that Dr. Traill and Mr. Steen stated that they would therefore leave the Bench and offer themselves for examination in open Court, and accordingly the magistrates left the room to which they had retired, and Dr. Traill and Mr. Steen took their stand in the body of the Court, the other magistrates returning to the Bench; that the chairman then asked whether

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anybody wished to offer evidence, and that Dr. Traill came forward, and, having asked to be sworn, deposed on oath that he believed M'Kenney was not a person of sober habits, adding that he himself had seen him under the influence of drink; that this statement was corroborated by Mr. Steen on oath from personal knowledge; that Mr. M'Laughlin declined to cross-examine Dr. Traill or Mr. Steen on the ground (as the Bench understood) that it was not fair or competent for a magistrate to retire from the Bench while a case was pending, and give evidence openly and upon oath in the matter before the Court, but that Mr. M'Laughlin did not explain how such a proceeding would be unfair or incompetent; that Mr. R. M. Douglas, a magistrate of many years' standing, happened to be in Court; that this gentleman lived at Portballintrae, within two hundred yards of M'Kenney's house, and was the person to whom the police would naturally and in ordinary course have applied if they had desired to inform themselves of the applicant's habits and character, or had thought it their duty to do so; and that it was suggested from the Bench that he should come forward and be examined; that Mr. Douglas came forward, and, being examined on oath, stated that M'Kenney was not a person of sober habits, and that he himself had seen M'Kenney under the influence of drink, and that quite recently; that Mr. Douglas was not cross-examined, although the objection, taken in the case of Dr. Traill's evidence and Mr. Steen's, did not apply in the case of Mr. Douglas, and although no other objection was suggested; that in these circumstances the magistrates unanimously thought it their duty to refuse the certificate of good character; that neither Dr. Traill nor Mr. Steen took any part in the decision, nor did they occupy a seat on the Bench after the magistrates returned to Court; that Mr. M'Laughlin "did not put forward in Court the suggestion which appears to be contained or involved in" M'Kenney's affidavit, viz.—"that the police are the only persons entitled to oppose an application for a certificate of good character, and that consequently, if the police for any reason choose to abstain from making inquiries and informing themselves as to the character of the applicant, the magistrates have no option but to sign a certificate, stating, as a fact, that which they may have reason to believe is

untrue"—that the provisions of the Act of 1864, on which this suggestion was supposed to be founded were not brought to the magistrates' attention or referred to by Mr. M'Laughlin; and that they therefore desired to state that they were not asked to consider, and did not consider, the question (if any such question there were), and were not to be understood as having expressed any opinion upon the point.

An affidavit was also filed on behalf of Dr. Traill. He deposed that he had known M'Kenney for many years, and was well acquainted with his character and habits, and considered him to be a person quite unsuitable to be trusted with the holding of a spirit grocer's licence; that he (Dr. Traill) was astonished to find that no evidence of M'Kenney's habits was offered by the police when such evidence was within their reach; that, when Sergeant Carson stated that the applicant and his premises were suitable, and that the police had no objection to the granting of the licence, Dr. Traill asked, "Have you never seen this man under the influence of liquor?" that Carson answered "No," adding, to Dr. Traill, that he had been in the district for three years; that Dr. Traill considered this evidence unsatisfactory from his own knowledge of the man and the locality; that, had the police made any inquiries amongst the residents in Portballantrae as to the character and habits of M'Kenney, they would have been amply supplied with evidence that the applicant was an unsuitable person—evidence of which they appeared to be ignorant—evidence which, under such circumstances, Dr. Traill felt himself constrained to give—that this was, moreover, proved by the evidence of Mr. R. M. Douglas, J.P., of Portballantrae, who stated in Court that he had seen the applicant drunk quite recently; that further, when the magistrates adjourned to consult upon the case, which they did not at that time by any means consider closed, Mr. Steen and Dr. Traill at once said that they would leave the Bench and give evidence in open Court, and be subject to cross-examination; and that, had they had not done so, the ends of justice would, in their belief, have been frustrated.

An affidavit was also filed by Mr. Steen corroborating the statements in Dr. Traill's affidavit.

The applicant, in an affidavit in reply, denied entirely the charges of insobriety made against him; and stated that, though

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not a total abstainer, any charge of drunkenness had never been preferred against him; that on one occasion about three months previously, while leaving home with a neighbour who was under the influence of liquor, he had been met by Mr. R. M. Douglas; that he (M'Kenney) was then perfectly sober; and that this must be the occasion on which Mr. Douglas had based his charge against him; that, in February, 1899, he had applied to the Justices at Bushmills for a similar certificate; that the application was then objected to by the police on the ground that it should be made at the annual licensing sessions in September; that he had then been examined in support of his application, and that no allegation whatever of unfitness was made against him on that occasion, the application being refused by a Bench consisting of Sir F. E. Macnaghten, and Messrs. A. H. Steen, James Boyle, N. H. Grimshaw, and Dr. J. Brownrigg on the ground, raised by the police, that it was not the annual licensing sessions, and that it was then stated that the application would be renewed in September.

Ronan, Q. C., Henry, Q. C., and *P. A. O'C. White*, for the applicant.

Campbell, Q.C., and *Traill*, for the Justices.

Cur. adv. vult.

Nov. 24.

SIR P. O'BRIEN, L. C. J.:—

An application has been made to us in this case for writs of *certiorari* and *mandamus* under the following circumstances:—It appears that on the 14th of last September, Patrick M'Kenney applied to the magistrates for the Petty Sessions district of Bushmills in the county of Antrim, for the certificate necessary in order to obtain a spirit grocer's licence for his house, which was situate in the Petty Sessions district of Bushmills. The Bench who heard the application consisted of Sir Francis Macnaghten, Lord Macnaghten, Dr. Anthony Traill, Mr. Steen, and Mr. James Boyle. There was no objection to the application on the part of the police. The district inspector stated that he had inquired into the circumstances of the case, and that, being satisfied as to the good character of the applicant and the suitability of the premises, he offered no

objection. The police sergeant was examined, and deposed to the good character of the applicant and the suitability of the premises. Dr. Traill, one of the magistrates, stated that he would not sign the certificate. The magistrates retired to their room for a minute or so, not to consider their decision, but with a view, apparently in face of Dr. Traill's statement, to consider what procedure should be pursued. This was quite legitimate, and a most proper course. On their return to Court, all the magistrates, save two, took their seats on the Bench. Dr. Traill and Mr. Steen proceeded to the body of the Court; the chairman asked did anyone wish to give evidence; Dr. Traill came forward and was sworn, and gave evidence as to the insobriety of the applicant; so also did Mr. Steen. A gentleman named Douglas, a magistrate of many years' standing, who happened to be in Court, and who lived within a couple of yards of the applicant's house, and who was naturally best qualified to speak as to the applicant's character, came forward at the suggestion of the Bench, and on examination stated that M'Kenney was not a person of sober habits. Under these circumstances the magistrates unanimously refused the certificate. Neither Dr. Traill nor Mr. Steen took any part in the decision, nor did they occupy seats on the Bench after the magistrates returned into Court. Mr. M'Laughlin, who was a solicitor representing the applicant, declined examining Dr. Traill or Mr. Steen, on the ground that it was not fair or competent for a magistrate to retire from the Bench while a case was pending, and to give evidence openly and upon oath upon the matter before the Court.

We are all of opinion that there was nothing whatever in this objection of Mr. M'Laughlin. It was quite competent for a magistrate to retire from the Bench and give evidence in a case—he, of course, taking no further part in the decision. In fact, if a magistrate was in the exclusive possession of relevant facts, it was not only fair to retire from the Bench, and to give evidence, but it was his bounden duty to do so. This is quite an elementary matter.

What exactly took place is set forth in the 9th paragraph of the affidavit of Sir Francis and Lord Macnaghten. It is stated in that paragraph that the absence of the magistrates from the

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Court lasted about a minute or so, and that the difficulty which gave occasion for their retirement was removed by Dr. Traill and Mr. Steen, who both said that they had seen M'Kenney under the influence of drink, intimating that they quite agreed that it was impossible for the magistrates as a body, or individually, to act upon private information or personal knowledge. They stated that they would, therefore, leave the Bench and offer themselves for examination in open Court. They accordingly did so, were examined like other witnesses in open Court, and upon oath, and took no part in the determination of the case.

That this course was correct, was, as I have already stated, quite an elementary matter, and if we had to deal with the objection taken by Mr. M'Laughlin, we should have no difficulty whatever. In fact, there would be no ground for discussion.

But the difficulty which is involved in the case arises from the fact that there was no objection by the police, and from the consequence which, it is alleged, attaches to the absence of such an objection, namely, that there was no jurisdiction or authority in the magistrates to refuse the certificate.

Sir Francis Macnaghten and Lord Macnaghten state as follows in the 16th and 17th paragraphs of their affidavit:—"Mr. M'Laughlin did not put forward in Court the suggestion which appears to be contained or involved in paragraph 6 of Patrick M'Kenney's affidavit, that the police are the only persons entitled to oppose an application for a certificate of good character, and that, consequently, if the police for any reason choose to abstain from making inquiries and informing themselves as to the character of the applicant, the magistrates have no option but to sign a certificate which they have reason to believe is untrue. The provisions of the Act of 1864, on which, as we are informed, this suggestion is supposed to be founded, were not brought to our attention or referred to by Mr. M'Laughlin. We, therefore, desire to state that we were not asked to consider, and and that we did not consider, the question (if any such question there be), and that we are not to be understood as having expressed any opinion upon the point."

It will be perceived from these two paragraphs that the point as to the necessity of an objection by the police as a condition

precedent to the right to refuse a certificate, was not discussed before the magistrates, and that Lord Macnaghten and Sir Francis Macnaghten are very careful not to express any opinion on it. The propriety was obvious of abstaining from giving any intimation of opinion on the point, having regard to the very authoritative position of Lord Macnaghten as a member of the highest legal tribunal in the United Kingdom. Lord Macnaghten, feeling that the point, as it was not referred to before the magistrates, should be dealt with by us alone, has carefully abstained from even adumbrating his opinion.

However, the very point seems to me to be concluded by two cases in this country—the cases of *The Queen* (*Marshall*) v. *The Justices of Tyrone* (1) and of *The Queen* (*Morgan*) v. *Justices of Tyrone* (2). Both these cases decided that, if there is no objection by the police, the magistrates must give a certificate as to the suitability of the premises. In *Morgan's Case* (2), on the applicant's own statement, and in answer to a question from the Bench, it appeared that the premises were unsuitable. Upon this the magistrate refused to grant the certificate. It was held, nevertheless, by a fully constituted Court that, the only legitimate objector being an officer of the police, and there being no objection on his part before the Court, the Justices were bound to grant the certificate. *Morgan's Case* (2) followed the judgment in *Marshall's Case* (1); but not one of the judges in *Morgan's Case* (2) expressed any dissent from the decision in *Marshall's Case* (1).

Mr. Justice Johnson, in giving judgment, said:—"The Justices have not, in my opinion, any jurisdiction to originate an objection themselves, or to hear any person objecting except the police officer, to whom the Legislature has in this case entrusted the duty of objecting."

Lord Justice Holmes, who then was a member of the Court, said:—"They were bound to give the certificate unless there was an objection before them." My brother Gibson concurred, holding the question to be settled by *Marshall's Case* (1), and he added that if anything transpired to show that the premises were unfit, the police officer's attention might be called to it, with a view to his entering an objection and having the matter fully discussed.

(1) [1896] 2 Ir. R. 15. (2) [1896] 2 Ir. R. 318.

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The course suggested by my brother Gibson is obviously a correct one. No police officer would hesitate for a moment to enter an objection, if the Bench suggested he should do so with a view to having the matter fairly inquired into, unless indeed the prejudice of the tribunal was so demonstrative as to show it had neither eyes nor ears for fair discussion.

But it has been suggested that there is a difference where the question is the character of the applicant, and not the suitability of the premises. I am wholly unable to adopt this suggestion. *Ex concessis*, the magistrates are bound, there being no objection by the police, to give a certificate, though they believe the premises to be unsuitable. The condition as to the right to refuse to give a certificate as to character, or as to the suitability of the premises, is identical, depending upon, and created by, the self-same words of the same section, namely, the 5th section of the Act of 1864, which deals *uno flatu* with the certificate as to character and as to the suitability of the premises.

The words of the section are as follows :—"The sub-inspector of the district, or in his absence the head constable, shall be and is hereby authorised to object before the Justices at Petty Sessions to the issue of such certificate."

What certificate? The certificate as to the character of the applicant and suitability of the premises. The section goes on—

"And the Justices shall *in such case* proceed to consider and examine on oath into and adjudicate upon the truth, sufficiency, and validity of such objection, *and if such Justices shall be satisfied of the truth and sufficiency of any such objection, they may refuse to grant such certificate.*"

"Such certificate" plainly means the certificate as to character and suitability of premises; and it is, in my opinion, absolutely plain that, if an objection by the police is a condition precedent to the right to refuse the certificate in the case of the premises not being suitable, so also is it a necessary condition precedent to such right in case the applicant's character is not good. This, in my judgment, is as plain as any proposition can be. It is absolute demonstration—the palpably inevitable result. Postulating, as has been decided, that objection by the police is a necessary condition of refusal to grant the certificate on the ground of the

unsuitability of the premises, it follows as a necessary and inevitable result that objection by the police is a necessary condition of refusal on the ground that the character of the applicant is bad.

The decision in *Marshall's Case* (1) and in *Morgan's Case* (2) may be quite wrong, but let them be reversed, if they are wrong, by the Court of Appeal; we have no authority to disregard them.

It must be always borne in mind that this is a question of a spirit grocer's licence, and not the question of a publican's licence. Any one of any experience in these matters is familiar with the decisions on the Act which regulates publicans' licences, and with the observations made by Chief Justice Lefroy in the case of *In re Dillon* (3). These cases had reference to another and different Act of Parliament. The only point at issue in *Re Dillon* (3) was as to whether the Case Stated Act applied. It obviously did not, and it was so decided. No doubt, Chief Justice Lefroy, in giving judgment, said:—"The party wanting the certificate applies to the local magistrate for it, just in the same way as a servant would go to his master for it"; but this expression of opinion was in the particular case a mere *obiter dictum*. But I must say the analogy suggested by my distinguished predecessor entirely repels me. I am afraid that a great deal of harm has been done by the great laxity which exists as regards servants' discharges.

It is said that if a magistrate knows a man to be of bad character, it is not alone an illegal but an immoral act to flout his conscience by compelling him to certify what he does not believe. In my opinion, the magistrate who acts pursuant to statutory obligation incurs no responsibility. If the police officer does not object the condition which enables the magistrate judicially to investigate the matter does not arise; and he simply does what the statute directs—gives the certificate. There is in that case no legal evidence of bad character before him, and in the absence of such evidence he must certify as to the applicant's good character. It is merely a certificate pursuant to statutory obligation, and the condition which would enable the magistrate to

(1) [1896] 2 Ir. R. 15. (2) [1896] 2 Ir. R. 318. (3) 11 Ir. C. L. R. 232.

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determine that the character is bad is not present. Is it to be said that, because a magistrate believes a man to be of bad character, without any evidence having been given to that effect in open Court, he can on that ground refuse to give a certificate? Is it contended that a magistrate can, in Court, act upon impressions received out of Court, which may be the result of prejudice, or of the self-interest and falsehood of third parties working upon prejudice? A magistrate may thoroughly believe a man to be of bad character from impressions derived out of Court; but is it to be laid down that in that case he is justified in refusing an application for a certificate?

In the present case I think, if the matter was legally open to them, there was abundant material to justify the opinion of the magistrates that the man was not of good character within the meaning of the Act. I say this to show that I am very far from making any reflection whatever on the moral action of the magistrates; I am merely testing how far the proposition is to be pushed, that in no case should a magistrate be made to certify that a man has a good character when the magistrate believes it to be bad.

It is only right by the magistrates to state that this view is wholly repudiated by them. In the 9th paragraph of the affidavit of Sir Francis Macnaghten and Lord Macnaghten, it is stated that Dr. Traill and Mr. Steen quite agreed with the other magistrates that it was impossible for the magistrates as a body or individually to act upon private information or personal knowledge. If they acted upon private information, or personal knowledge, which was not tested in open Court, they ought, in my opinion, to be compelled by this Court to grant the certificate; and though they believed the applicant was a man not of good character, there would have been in the case I put no judicial determination that the applicant was of bad character. By "judicial determination" I mean a decision by a competent tribunal upon sworn evidence and in open Court. And this, in my judgment, never can take place in the case of a spirit grocer's licence until the necessary condition precedent has been satisfied, namely, an objection by the police. The words of the Act of Parliament are "in such case," that is, where the district inspector

objects, and the condition of the right to refuse the certificate is plainly expressed, "if the Justices are satisfied of the truth and sufficiency of any *such* objection, they may refuse to grant such certificate."

For my own part, I see great prudence in making objection on the part of the police essential. I think it would not be inexpedient that it were essential in the case of licences of every description; for I can well understand how, at times, when prejudice is rampant, a power to refuse the necessary certificates might lead to great oppression.

I have said so much lest it should be thought that *Marshall's Case* (1), to which Mr. Justice O'Brien and myself were parties, and *Morgan's Case* (2), which my brothers O'Brien, Johnson, Holmes, and Gibson decided, have not my entire approval.

As I understood Mr. Campbell's argument, he did not at all seek to distinguish these cases from the present, so far as related to the necessity of there being an objection by the police. His argument was directed to another matter. He contended that we should not grant a writ of *mandamus* if M'Kenney had another effective remedy.

This was the position he really assumed, and in taking this position we think he was right. There is no doubt, if there was another adequate and effective remedy open to the applicant that he is not entitled to come here for a writ of *mandamus*. This is the settled law. We are all of opinion that there was another remedy. He had a right of appeal to Quarter Sessions. This is provided by the 13th section of the Act of 1864. An appeal is clearly given by this section to either party to the proceedings before the Justices. This right is clearly conferred by the statute on either party, and in our opinion this right cannot be cut down by mere machinery provisions, some of which, no doubt, contemplate the existence of an opposing party, but which, in my opinion, are applicable only where there is an opposing party. Though there be no opposing party, the general right to appeal remains; indeed, it has been plausibly contended that there is an opposing party, as notice of application was served upon the district

(1) [1896] 2 Ir. R. 15. (2) [1896] 2 Ir. R. 318.

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inspector. However, I prefer to rest my decision on the ground that a right of appeal was conferred on either party by the statute, and that the language of the section which confers it ought not to be controlled by provisions as to procedure where there is an opposing party.

This being so, there being an adequate and effective remedy by appeal, the application for a writ of *mandamus* must be refused. The application for the writ of *certiorari* must also be refused. The writ was asked for as merely ancillary to the writ of *mandamus*.

I have dealt with the case as it was presented in the argument, but I desire to be very explicit in pointing out that it was not suggested at the Bar that this point as to the absence of an objection by the police not having been made before the magistrates cannot be made here. It is not a case in which in no event the magistrates would have no jurisdiction. The absence of jurisdiction depended on the absence of objection by the police; and, if this point was made below, it might be remedied at once. The point, however, was not made. I pronounce no opinion on it. The applicant's motion must be refused with costs.

MURPHY, J.:—

I concur in the judgment of the Lord Chief Justice in so far as he states the result at which we have all arrived—that the application for a writ of *mandamus* should be refused. But, in respect of one portion of his judgment, namely, as to the obligation supposed to lie upon the magistrates, under the circumstances disclosed in the affidavits before us, to grant a certificate as to the applicant's character, upon that part of the case I entertain a very strong opinion, and am obliged to express my dissent from the view, upon that point, expressed in the judgment of the Lord Chief Justice, so far as it forms part of his *ratio decidendi*. There is, in my opinion, a great difference between a certificate as to the suitability of premises—in regard to which magistrates may be no judges at all—and the police the most excellent judges, and a certificate as to the good character of an individual.

The question in the case arises under the statute 27 & 28 Vict. c. 35, entitled "An Act for more effectually regulating the sale of Beer in Ireland," or, "The Beerhouses (Ireland) Act, 1864."

By section 3 of that Act, it is provided that, "It shall not be lawful for any officer of excise in Ireland to grant a licence or transfer of a licence for the sale of beer by retail, to be drunk or consumed elsewhere than on the premises where sold, to any person applying for such licence or transfer of a licence, or to grant a renewal of any such licence as aforesaid to any person applying for such renewal, without such person producing a certificate signed by two or more justices of the peace presiding at the Petty Sessions of the district in which such person resides . . . to the good character of such person, and the suitability of the premises for the purpose of such sale . . . "

To lawyer or layman there are no words in this section difficult to be understood. The person applying for a licence, or for a renewal, must produce "*a certificate* signed by two or more magistrates, presiding at Petty Sessions, to the good character of such person." Is there any doubt as to the meaning of the word "certificate"? Is it not a voucher or attestation in writing as to some fact stated on the responsibiliy of the persons signing or subscribing the document that is there called "*a certificate*" as to the "*good character*" of the applicant? There can scarcely be any doubt as to the meaning of these words. Is then their ordinary sense or meaning to be disregarded, more especially when these words are to be found in an Act of Parliament, and when the facts are to be *certified to* and *signed by* two or more Justices sitting at Petty Sessions?

The Act is not conferring any jurisdiction on the Justices. It merely provides for the sending of the applicant to them, asking them to certify as to his character; and I assume that the framers of the Act must have believed that the certificate would be signed by Justices who believed, or had reason to believe, that what they said in their certificate was true. I can never come to the conclusion that what was contemplated by the Act was that the Justices should affix their names to a document which contained what they knew to be a falsehood.

It has been here argued that, by reasons of sections 4 and 5 of the same Act (27 & 28 Vict. c. 35), the Justices may be obliged to sign a certificate containing what they know to be false, that it is no harm to tell a lie, *virtute officii*; but sections

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4 and 5 can never have been intended to nullify actual knowledge, on the part of the presiding Justices, as to the character of the applicant. These sections, in my opinion, were intended merely to give a *locus standi* to the officer of police. It would follow, if what is contended for by the applicant be correct, that, even supposing Dr. Traill and Mr. Steen were the only two Justices presiding at Petty Sessions, then, in spite of their own knowledge to the contrary, they would have had jurisdiction to give, and would have been bound to give, a certificate as to the good character of the applicant. Supposing these two had been the only two presiding Justices, and that they had stated in open Court what they have here stated in the affidavits before us, namely, in effect, "We know this man to be in character a drunkard"; and I assume here that "character" includes some measure of sobriety—were they, I ask, or were any magistrates, possessed of the same knowledge, to be obliged to sign a certificate containing a statement which they knew to be false? Is it to be said that there is nothing unworthy of upright, honourable men in signing a certificate as to "good character" under these circumstances? Is it to be said that by force of an Act of Parliament, they are compelled, "by virtue of their office," to subscribe to what they know to be a lie—to sign a document, "as Justices," "presiding at Petty Sessions," which they could not honestly sign out of Court? I cannot believe that this was the intention of the Act of Parliament; and, furthermore, I am satisfied that no gentleman, having any regard to the truth of the statements in a document signed by him, would ever consent to sign a certificate upon such terms, or that any honest man could assent so to convert what is false into truth, and give the lie to their own conscience. It cannot be assumed that the Justices know the character of every applicant who comes before them. But at the same time, it was not intended if an applicant had, perhaps, rivals in trade, or persons at enmity with him, that these should be at liberty to appear in Court to give testimony against his character. Therefore, sections 4 and 5 were introduced for his protection; but these provisions could never have been intended to nullify actual knowledge possessed by the Justices themselves as to the applicant's character.

It is said that the officer of police made no objection. If objection on the part of the police is an adequate protection to the public, then give to the police the power to sign the requisite certificate. That would be right. But do not say that Parliament apparently gives to the Justices a power to exercise a certain discretion, and still, in the same breath, tells them, "You must sign what you know to be false; it is not for you, it is for the officer of police, to say whether the applicant's character be bad or good!" It seems to me that it would be a spectacle in open Court, if Justices were bound, in such a way, to attest as true what they knew to be false. Such a thing would be immoral and demoralizing; and I cannot hold that such was the intention of the Legislature.

I am of opinion that no writ of *mandamus* should in this case issue from the Court. If the opinion and knowledge of the police is to prevail—let it be so. But do not have the mockery of a certificate as to character—we all know what is meant by that—to be given by magistrates, *virtute officii*, in spite of their own knowledge, and in violation of their own conscience and of truth.

GIBSON, J.:—

The view that the magistrates took of the effect of the Irish legislation, is that which would commend itself to any ordinary intelligence. Our general legislation as to licences, however, as expounded by decisions by which (though I do not agree with many of them) I am bound, is in direct opposition to the law in England as laid down in *Sharp* v. *Wakefield* (1) and *Boulter* v. *Justices of Kent* (2). Our authorities, which, unfortunately, have never come under review before the House of Lords, seem to proceed upon the principle that every qualified applicant, on satisfying the statutory conditions, is entitled, in the absence of a specific statutory objection, to a certificate for a licence which the Justices have no right to withhold.

The application before us is resisted on two grounds, namely, that the magistrates could not be ordered to give a certificate of character which they believed to be false; and that *mandamus*

(1) [1891] A. C. 173. (2) [1897] A. C. 556.

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could not be awarded as the applicant could have appealed. Incidentally, several subordinate questions connected with these topics were discussed. I propose to consider—1, whether the Justices have any discretion in withholding a certificate of character where there is no legal statutory objection before them; 2, whether the right of opposition is confined to the police; 3, whether the applicant could have appealed from the Justices' order; 4, whether, if he possessed such right of appeal, he can apply for and obtain *mandamus*; 5, whether, if not entitled to *mandamus*, he can insist on *certiorari*.

1. Whether the Justices possess a discretion or not depends on 27 & 28 Vict. c. 35. The effect of 17 & 18 Vict. c. 89, s. 11, is not before the Court. That section was considered by me in *Lambe's Case* (1) to which, to avoid repetition of my views, I refer. In the case of *In re Dillon* (2), Lefroy, C.J. considered that, under this 11th section, the function of the magistrates was similar to that of a master dealing with a servant's request for a character; and in *Reg.* (*Molloy*) v. *Justices of Co. Dublin* (3), it was held that the Justices had a discretion which the Court could not overrule by *mandamus*. The fact that the Justices sit as a Court in which the decision of the majority prevails (*Reg.* v. *O'Connell* (4)), and that there may be an appeal from a refusal, may be some argument against this view, but it is not decisive.

In *Staverton Overseers* v. *Overseers of Ashburton* (5), it was considered that the assent of Justices to binding a pauper apprentice was a judicial act, which could be quashed on *certiorari*, though the assent manifestly could not have been compelled by *mandamus*. Similarly the consent of Justices under the Railways Clauses Act, 1845, to authorise the carrying of a railway across a highway on a level, though subject to appeal under section 60 of the Act, and a judicial act, could not have been the subject of *mandamus*. In some instances the action of the Justices is required to be based on their own personal observation: *Reg.* v. *Wallace* (6). I need not pursue the subject further. Save in rare

(1) [1897] 2 Ir. R. at p. 74.
(2) 11 Ir. C. L. R. 232.
(3) 10 Ir. C. L. R. 80.
(4) 20 L. R. Ir. 625.
(5) 4 E. & B. 526.
(6) 4 Q. B. D. 641.

cases, even if they could act on their own knowledge, Justices ought to proceed on sworn evidence.

Whatever be the construction of the Act of 1854, the statute 27 & 28 Vict. c. 35, is framed on very different lines. It contemplates an objection, a *lis*, a judicial hearing, an adjudication, and an appeal. If the power of objection is limited to the police, it is hard to suppose that an objection can originate with the Bench, and that they can proceed *ex informata conscientia*. *Marshall's Case* (1) and *Morgan's Case* (2) are conclusive authorities that, so far as regards suitability of the premises, where there is no police objection, the Justices have no discretion and must grant the certificate as of right.

It is, however, said that character is an ethical matter, as to which the history of the legislation shows that the certificate was to be the result of the Justices' personal conviction, and not a mere statutory record of the absence or insufficiency of an objection, by virtue of which the applicant became entitled to be declared of good character as a matter of statutory presumption.

I can see no sufficient ground for drawing any distinction between character and suitability of premises for the purpose of the certificate under the Act of 1864. They are linked together; are subject to the same objection; must be adjudicated upon in the same way; and the same appeal applies to both. The objection, that the Justices ought not to be compelled to give a certificate which they believe to be false, applies just as strongly to suitability as to character. A magistrate's knowledge acquired out of Court that premises were unsuitable would usually be derived from the testimony of his own senses, whereas bad character is commonly learnt from ill fame, or hearsay. Why should a Justice be compelled (in the absence of formal objection) to certify that premises are suitable which he knows not to be so, and not bound to certify as to character because he believes it to be bad? Character is just as much a fact as suitability. In each case the moral offence to conscience of requiring a false certificate is the same.

2. I do not feel at liberty to consider whether the power of

(1) [1896] 2 Ir. R. 15. (2) [1896] 2 Ir. R. 318.

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objection is confined to the police. *Marshall's Case* (1) so decides; and in *Morgan's Case* (2) I thought myself obliged to follow that decision. This limitation is in striking contrast with the unrestricted power of objection existing under the Act of 1854. It seems curious, that though Justices must satisfy themselves as to preliminary questions of qualification, residence, and notice—objection or no objection—they have, in default of formal objection by the police, no right to inquire into the truth of the matters they are asked to certify, their jurisdiction being thus cut in two, part being judicial, and part ministerial. The authorities, however, do not allow me to hold otherwise.

3. If the Justices were wrong in attending to an objection not made by the police—as I am coerced to hold—was there an appeal from their erroneous order? If the service of the notice under section 4 made the police officer a party, beyond question an appeal was competent. But there is some difficulty in holding that, where there was no opposition, and no *lis*, the officer could be deemed a party. Under 17 & 18 Vict. c. 89, sect. 11, no notice was required; and, in the appeal given by sect. 13 of the Act of 1864 to any person aggrieved by an order of refusal, the party opposing was to be respondent. Could an officer who did not oppose serve notice of appeal under the Act of 1864 in a case heard *ex parte*?

Supposing that there was no opposite party to be respondent in this case, is that circumstance fatal to the right of appeal? Much of the Justices' function depends on matters which need not be the subject of objection. Thus the application might be dismissed on the ground that the notice was not served, or that the applicant did not reside in the district (a question often of legal difficulty): *Gilbey's Case* (3); or because the applicant (as in *Dempsey's Case* (4)) appeared to the Court to be under the influence of drink—an imputation which he might be in a position successfully to refute. Under such circumstances, would he be unable, because there was no opposition, to appeal? In some cases indeed there might be a remedy by *mandamus*; but, where the question depended on facts and evidence, such remedy might be inapplic-

(1) [1896] 2 Ir. R. 15.
(2) *Ibid.* 318.
(3) [1897] 2 Ir. R. 559.
(4) Unreported.

able. Under 17 & 18 Vict. c. 89, section 11, notice of the intended application was not required to be given. How could the appeal given by the Act of 1864 depend on the accident of there being an opposing party when, under the Statute of 1854, the Justices might refuse the certificate, even though unopposed? On the whole, it would seem that, though the statutory machinery appears to be framed to meet the ordinary case of there being two parties, appellant and respondent, respectively, everyone aggrieved by an unjust refusal is entitled to appeal just as much where there is no opposition as where there is opposition. If this were not so, it might be necessary to consider whether, in order to preserve the right of appeal, an extended meaning might not be given to the word "party."

4. If there was a right of appeal, can *mandamus* be awarded? It is settled law that the existence of a sufficient alternative remedy is an insurmountable obstacle: *Reg.* v. *Lambourn Valley Railway Co.* (1). An appeal is such a remedy. *Reg.* v. *Smith* (2), *Gilbey's Case* (3), and similar cases, are not authorities the other way, as the objection was not there made, and the point was overlooked. It was also urged that the right of appeal was doubtful, and that *mandamus* therefore ought to be allowed. I think the Court is bound to decide whether there is a right of appeal; and that it cannot, by substituting doubts for a decision, give a *mandamus* which in its opinion ought to be refused. What is before us is the construction of public statutes, and not matters of private title, where formerly, in specific performance cases, Courts often seemed to be hunting for doubts in order to avoid the responsibility of pronouncing a decision.

5. Having decided against *mandamus*, must the Court declare the applicant entitled to *certiorari*? The cases show that there may be *mandamus* where *certiorari* is impossible, and, conversely, that there may be *certiorari* where *mandamus* is excluded. In all cases, however, where *certiorari* has been allowed as of right, the order sought to be quashed affected rights. Here there is no such order; *certiorari* is merely ancillary to *mandamus*; and, once *mandamus* fails, *certiorari* is useless as a substantive remedy. A

(1) 22 Q. B. D. 463. (2) L. R. 3 Q. B. 146. (3) [1897] 2 Ir. R. 559.

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wholly new application must be brought forward, which must be disposed of on its own merits, and cannot be affected by a previous invalid order. The only object of asking for *certiorari*, as things now stand, is to obtain a shield against costs. The whole difficulty has been brought on the applicant by his neglect of appeal. The effective remedy applied for, namely, *mandamus*, having been refused, the Court ought not to issue a futile *certiorari*: no substantial question of right being involved, and the object of the application being clearly indirect.

The magistrates seem to have acted with perfect propriety. The two gentlemen who were cognizant of the facts left the Bench, gave evidence as witnesses, and took no part in the decision, which was founded on evidence and not on any previous knowledge or information. The mistake into which the Bench fell was excusable. They were not apprised that their function was that of automatic machines, provided for the emission of certificates, without regard to truth, where statutory conditions appeared to be satisfied; and that it was their duty to certify what they believed to be untrue. They were unaware that in this country an intending spirit grocer is a favoured person, who is conclusively deemed to be of good character, and whose premises are deemed to be suitable, whenever the police see fit not to object. Had they possessed this information, they might have marvelled, but they doubtless would have yielded obedience to what the Courts would have announced to be law, though they might have done so unwillingly, and with regret that the partiality displayed by Parliament for this interesting section of the trading community should be associated with such an apparent strain and disregard of the magisterial conscience. It is no doubt a surprise to them when they have attempted to adjudicate conscientiously, to learn that they are a mere piece of mechanism, in the working of which personal conscience finds no place. But a Judge who is made a machine by law which he is sworn to obey, cannot allow his conscience to lead him to disobey that law. He ought not in that case to sit at all.

MADDEN, J.:—

I concur in the judgment of the Court; and, while I rest my judgment on a different ground, I am not to be taken as dissenting

from the reasons given by the Lord Chief Justice and my brother Gibson, or as questioning their sufficiency to support the conclusion at which we have all arrived. In my opinion, a writ of *mandamus* ought not to issue as the consequence of the refusal of a magistrate to give a certificate of personal character which he knows to be false. There is nothing in this proposition startling to the moral sense; and it seems to me to follow necessarily from the very nature of the certificate in question, and to be in entire accord with decided cases here and in England.

Through all the mazes of the licensing code, we can clearly trace the operation of two guiding principles—the protection of the revenue, which is effected by requiring a licence from an excise officer, and the protection of the public, which in the case of the licence under consideration is entrusted to Justices of the Peace. An excise licence is required, and this licence cannot be issued except upon a certificate signed by two or more Justices of the Peace to the good character of the applicant, and the suitability of the premises for the purposes of the sale.

These two requirements are essentially different in their nature, in their history, and in their relation to the interests of the public; and the circumstance that they may be dealt with in one and the same certificate does not, in my opinion, render the same considerations applicable to both. The third section of the Beerhouses Act of 1864 renders the certificate of two Justices to the good character of the applicant necessary in order to entitle him to a licence. The fifth section authorises the police to object before the Justices to the issue of the certificate, and directs the Justices to hold a judicial inquiry upon sworn testimony into the validity of the objection, concluding with the words—"and if such Justices shall be satisfied of the truth and sufficiency of any such objection, they may refuse to grant such certificate."

The position and duties of the magistrates, where there is no question as to the personal character of the applicant, and where the only question is as to the suitability of the premises, were fully considered by this Court in *Marshall's Case* (1), and *Morgan's Case* (2). In neither of these cases had the magistrates any

(1) [1896] 2 Ir. R. 15. (2) [1896] 2 Ir. R. 318.

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difficulty in certifying as to the character of the applicant, nor was there any objection on the part of the police to the suitability of the premises for the sale of spirits, as these words have been interpreted by the Court of Appeal in *Reg.* v. *Justices of Tyrone* (1). *Marshall's Case* (2) is thus referred to by O'Brien, J. —"It was a case where the Justices themselves became the objectors, and treated as still subsisting an objection made at a former hearing which the Court of Appeal had declared to be illegal." It was held by this Court that the duty of the magistrates in that case was restricted to deciding upon the validity of an objection brought before them by the police, and that, in the absence of an objection, they were bound to certify to the suitability of the premises. In the words of Holmes, J.— "In this case, so far as I can see, there is no doubt that the applicant had premises in which the business of a spirit grocer could be carried on. That being so, the question that came before the Justices, was whether they should give the certificate mentioned in the Act of Parliament. They were bound to give it unless there was an objection before them."

That is a decision binding on this Court, and on every member of it. It would be sufficient for me to say that I accept it as such, but I may add, that I think that the question of the suitability of a house for a particular purpose is a matter of fact, eminently proper to be decided upon evidence given in open Court, upon objection formally taken by a *legitimus contradictor* under the 4th and 5th sections of the Act. The only objector recognised by the Statute is the representative of the police. If the magistrates could take upon themselves the functions of a statutory objector, there would be some danger that they might be influenced by considerations and views, honestly entertained, but not in accordance with law. From these observations, and from the concluding remarks of my brother Gibson, it will appear that my obedience to the decision of this Court in *Morgan's Case* (3), is more willingly rendered than that which is accorded by him.

These considerations, however, appear to me to be inapplic-

(1) [1895] 2 Ir. R. 174. (2) [1896] 2 Ir. R. 15. (3) *Ibid.* 318.

able to a certificate of personal character, required for the protection of the public, from persons who are assumed to have special means of information, and a special interest in maintaining the orderly and moral character of a district. The magistrate who refuses to give a certificate of this kind which he knows to be false, does not take upon himself the functions of an objector under the 5th section of the statute under consideration. He acts judicially no doubt, but he performs a judicial act of a very special nature, in regard to which an appeal is made to his personal knowledge of individual character, where he possesses such knowledge, in the interests of the general public. From the very nature of such an appeal, he must, I think, be entitled to act independently of the provisions of the statute with regard to an objector, and of evidence formally adduced as to matters of which he may have no personal knowledge.

We are not without guidance as to the functions of a Justice of the Peace under circumstances very analogous to those in the present case.

Under an English statute (43 Eliz. c. 2), the assent of two Justices to the binding of a pauper apprentice was required. The giving of this assent was held by the English Court of King's Bench to be a judicial act, and it was decided that as such it should be done by the Justices acting conjointly, and not separately, *Rex* v. *Hamstall Ridware* (1). "The act of the Justices in this case is in its nature an act of judgment. They are the guardians of the morals of the people, and ought to take care that the apprentices are not placed with masters who may corrupt their morals. The Justices therefore should inquire particularly whether or not they ought to allow the binding by the parish officers; and I think they would be guilty of a breach of duty if they implicitly gave their assent without examining into the circumstances of the case": *per* Ashhurst, J. (2). This decision was followed by the same Court in the case referred to by my brother Gibson of *Overseers of Staverton* v. *Overseers of Ashburton* (3); and the judgments there delivered contain observations on the nature of a judicial act involving personal

(1) 3 T. R. 380. (2) *Ibid.* 382. (3) 4 Ell. & Bl. 526.

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inquiries on the part of the Justices, and a personal guarantee as to character, which appear to be applicable to the certificate with which we are concerned in the present case. Lord Campbell, C. J., said (1), "It was most important that the Justices should make inquiries respecting the proposed business, the family of the child, and, still more, the family of the master with whom the apprenticeship was to take place. It is manifest that if Justices, when called upon to act under statute 43 Eliz. c. 2, s. 5, had, upon inquiry, refused to assent to the binding, they could not have been compelled to do so; an application for a *mandamus* under such circumstances would not have been listened to for a single moment." The point decided in this case, was that the instrument containing the assent of the Justices should show on its face that the Justices acted within their jurisdiction. Its importance in the present case consists in its recognition of the proposition that a duty of a judicial character might be cast upon magistrates, in the discharge of which they may, acting upon their individual knowledge and opinion, refuse to do a certain thing, and in the strong expression of opinion that *mandamus* would not lie under such circumstances. It furnishes a complete answer to the question which has been asked, whether a magistrate, acting judicially in Court, can proceed on grounds, founded, not on evidence given in Court, but upon knowledge otherwise obtained.

The magistrates' certificate, under the Licensing Act, in its origin and character, appears to be very analogous to the consent required under the English statute of Elizabeth. O'Brien, J., observed, *In re Dillon* (2):—"The Justices' certificate of good character was substituted by the late Spirit Licence Act for the certificate required by former Acts to be signed by several householders, and is a certificate as to a matter of fact to be inquired into by the Justices." The Court in that case held that the application for a certificate of character is not an "information or complaint," within 20 & 21 Vict. c. 43, sect. 5,—Lefroy, C. J., observing:—"The party wanting the certificate applies to the local magistrates for it, just in the same way as

(1) 4 Ell. & Bl. 532. (2) 11 Ir. C. L. R. 232, at p. 237.

a servant would go to his master for a character." The analogy suggested by these eminent Judges would have very little relevance, if the refusal of the Justices could be made the subject of a writ of *mandamus*. Their observations may be *obiter dicta*, but they are the *dicta* of Judges who were not in the habit of using language without due consideration, and I consider them deserving of the highest respect.

Mr. Ronan pressed his argument (logically, I think) so far as to contend that a magistrate who was an eye-witness to the habitual drunkenness of an applicant for a licence must needs certify to his good character, if the police did not object. The magistrate would in such a case, he said, act automatically. How far a magistrate, certifying to what he knows to be false, to the imminent danger of the public, could be justified, *in foro conscientiæ*, by a decision of the Queen's Bench, that he acted automatically, is a question of casuistry which I will not pursue. I cannot suppose that any opinion which I might express on such a point would be accepted as authoritative. Suffice it to say, as a legal proposition, that the automatic theory is precisely that which was rejected by the English Court of Queen's Bench. This theory of *automata* seems to have been borrowed from the Cartesian philosophy, where it was introduced in order to get rid of certain moral difficulties regarding the lower animals, and its application in the present case would certainly have surprised its illustrious author. The English Court of Queen's Bench, in the case to which I have referred, refused to treat the assent of Justices of the Peace, under analogous circumstances, as a ministerial or automatic act. It was held to be a judicial act, to be performed by the Justices, acting in their capacity of guardians of the morals of the people, as the result of personal inquiries which they were bound to make. In addition, and as a further safeguard, the statute before us provides for notices, and for the formal hearing and decision of an objection. If it had been intended to relieve the magistrates from all responsibility in the matter, other than the decision of a formal objection, the statute might have done so in express terms. It might have provided that the excise licence should issue, unless the police objected. It has not done so expressly. It has not, in my

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opinion, done so by implication. I regard the provision in the 5th section as applicable to the proper subject-matter of an objection, but as inapplicable to the duty and obligation, cast upon the magistrates by the 3rd section, independently of any objection, to certify truthfully in regard to a matter which intimately concerns the interests of the public, to the best of his knowledge, information, and belief. For these reasons, I think that the conditional order for a writ of *mandamus* should be discharged.

A. E. R. J.

Appeal. 1900. April 30. May 3. June 25.

The applicant appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.)

Ronan, Q.C., and *Henry, Q.C.* (with them *P. A. O'C. White*), for the appellant.

Campbell, Q.C., and *Traill*, for the respondents.

Cur. adv. vult.

June 25.

FITZ GIBBON, L. J. :—

This is an appeal against the unanimous refusal, by four Judges of the Queen's Bench Division, of a *certiorari* to quash an order of the Justices at Bushmills Petty Sessions, refusing the relator's application for a certificate of good character under the Beerhouses (Ireland) Act, 1864, sect. 3; and for a *mandamus* to hear and determine the application. It is not necessary to deal separately with the *certiorari*, because it is sought only as ancillary to the *mandamus*, of which the object is to obtain the certificate as of right; the relator contending that the Justices had no jurisdiction or discretion to refuse it, because the police did not, at Petty Sessions, object to its issue.

The course of the case has been peculiar. At Petty Sessions the relator only questioned the conduct of the Justices in taking the evidence of three of their number against him. He did not then rely on the absence of a police objection. Had he done so, the omission could have been supplied; and, subject to an

adjournment if required, the party point would have disappeared. In the Queen's Bench, he contended that in Ireland, under the Beerhouses Act, 1864, and in the case of spirit grocers under the Licensing Acts, 1872 and 1874, sects. 82 and 9, the magistrates *must* certify to the good character of every applicant to whom the police do not object. This contention, if well founded, extends the class of persons entitled to licences from those whose good character two Justices in Petty Sessions are willing to certify, to the indefinite class of all persons to whom the local police may, for any cause—through mistake, inadvertence, favour, improper influence, or even mere carelessness or accident—have omitted to object. It, in effect, transfers the discretion power and jurisdiction of the licensing authority, in these cases, from the magistrates to the constabulary, without expressly imposing any duty whatever of inquiry, or of action, upon the police.

The Lord Chief Justice held himself bound by a previous decision of O'Brien, J., and himself, in *Reg.* (*Marshall*) v. *Justices of Tyrone* (1), to go to the full length of this contention. Gibson, J., also held himself bound by that decision, but he observed upon it in terms indicating no approval of it. Both these Judges refused the *mandamus* on the ground that the relator had another remedy, viz.: an appeal to Quarter Sessions. Murphy, J., and Madden, J., extricated themselves from *Marshall's Case* (1) by distinguishing the part of the certificate as to good character from that as to the suitability of the premises, and they emphatically repudiated the conclusions of the Chief Justice and Gibson, J., on the question of jurisdiction. Murphy, J., strongly dissented from the argument that the provisions for objection by the police were intended "to nullify actual knowledge, on the part of the presiding Justices, as to the character of the applicant." Madden, J., held that a "*mandamus* ought not to issue as the consequence of the refusal of a magistrate to give a certificate of personal character which he knows to be false."

The relator's application for the certificate came unexpectedly before five Justices at Bushmills Petty Sessions on September 14th, 1899. Knowing the applicant's character, and being surprised at

(1) [1896] 2 I. R. 15.

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the absence of objection by the police, one of them, Dr. Traill, announced that he would not sign it. The Justices conferred, and two of them, Dr. Traill and Mr. Steen, retired from the Bench, and tendered themselves as witnesses. The remaining three, Sir Francis Macnaghten, one of the most experienced magistrates in Ireland, for many years foreman of the Antrim Grand Jury; Lord Macnaghten, whom we know from other cases to occupy himself as an Antrim J.P. when not judicially engaged elsewhere, and Mr. Grimshaw, received the evidence of Dr. Traill and of Mr. Steen, and they also invited and received the evidence of a third magistrate, Mr. Boyle, who "happened to be in Court" though not on the Bench, who is "a magistrate of many years standing," who "lives at Portballantrae, within 200 yards of M'Kenney's house," and who "was the person to whom the police would naturally and in ordinary course have applied, if they had desired to inform themselves of the applicant's habits and character, or had thought it their duty to do so." The relator's solicitor declined to cross-examine these witnesses, "on the ground that it was not fair or competent for a magistrate to retire from the Bench while a case was pending, and to give evidence in the matter." I quote from the affidavit of Sir Francis and Lord Macnaghten. It is unnecessary to refer further to this ground of objection, as the propriety of the Justices conduct, if they were legally at liberty to receive any evidence at all, is fully established. The relator's solicitor "did not put forward in Court the suggestion that the police were the only persons entitled to oppose an application for a certificate of good character, and that consequently, if the police, for any reason, choose to abstain from making inquiries, and informing themselves as to the character of the applicant, the magistrates have no option but to sign a certificate, stating as a fact that which they may have reason to believe is untrue." The provisions of the Act of 1864, on which this suggestion is supposed to be founded, were not brought to the attention of the Justices, or referred to at Petty Sessions. Had that point been made, having regard to the evidence of the three Justices, the Chief Justice gives it as his opinion that "no police officer would have hesitated for a moment to enter an objection, if the Bench suggested that he should do so, with a view to having

the matter fairly inquired into." In *Morgan's Case* (1), the Queen's Bench has held that, under such circumstances, the Justices can call the attention of the police officer to the alleged ground of disqualification, if he be not already prepared to object, and that they may, if necessary, adjourn the hearing to allow him to make, or to enable the applicant to meet, the objection.

Were there no other grounds for refusing the *mandamus*, it seems to me to be enough that it is sought, against the truth and merits, on the ground of an omission and a slip which, the Chief Justice says, "might have been remedied at once" if the attention of the Justices had been directed to it. Furthermore, it appears to me that the writ should not go, because it must be abortive. The police, now knowing the applicant's character, will be bound to object if the case is reheard, and it is conceded that the evidence already given on oath in the applicant's presence in open Court must have been received if the police had objected, and that, if receivable, it was sufficient to warrant the refusal of the certificate. The Chief Justice says: "If the matter was legally open to them, there was abundant material to justify the opinion of the magistrates that the man was not of good character within the meaning of the Act."

Those grounds are supplemented by the existence of the other remedy, the appeal under section 13, on which all the Judges of the Queen's Bench agreed that the *mandamus* ought not to go. I agree with the Lord Chief Justice, that "the right of appeal is clearly conferred," and that it "cannot be cut down by mere machinery provisions, some of which, no doubt, contemplate the existence of an opposing party, but are applicable only where there is an opposing party." The right of appeal cannot be denied to a party dissatisfied with an *ex parte* decision against him, because the Act which gives the appeal makes it subject to the provisions of other Acts referring to cases *inter partes*. Gibson, J., well points out that under the previous Act, 17 & 18 Vict. c. 89, s. 11, notice of the intended application was not required to be given, that the existence of a sufficient alternative remedy is an insurmountable obstacle, that an appeal is such a remedy, and that the relator had the right of appeal. The

(1) [1896] 2 I. R. 318.

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existence of an appeal is not always, nor even generally, an answer to an application for *certiorari* or *mandamus*, where an order has been made without or in excess of jurisdiction. But in this case, as the Queen's Bench has held it sufficient to guide their discretion to refuse the writ, I hold that we ought not to reverse their order.

I pass from these points to the broad ground of principle, on which Murphy and Madden, JJ., based their judgments. This Court is not bound by the decision of the Lord Chief Justice and O'Brien, J., in *Marshall's Case* (1), and I am therefore relieved from the necessity of distinguishing it. I dissent from it. It seems to me to be abandoned when it is admitted, as it was here at the Bar, that Justices are entitled to call on the applicant to give some evidence. It is admitted that he must satisfy them that he has premises in which the trade for which he seeks a licence can be carried on. If the *onus* lies on him to show that he has a house, it must equally lie on him to show that he has a character. If the Lord Chief Justice is right, "as to the necessity of an objection by the police as a condition precedent to the right to refuse a certificate"; if he is right in saying that "the magistrates are bound, there being no objection by the police, to give a certificate, though they believe the premises to be unsuitable," it must follow that a certificate must be granted, though no evidence is offered, even when the magistrates *know* that the "premises" are a pigstye. The certificate of character must equally be given to an applicant who appears in *delirium tremens*, or in a strait-waistcoat, or—as the Act does not require his personal attendance—though it may be known that he is on the run, or in jail. If the District Inspector or Head Constable does not happen to be in Court, or does not make the objection, the licensing authority is powerless, and the certificate must be signed then and there, if *Marshall's Case* (1) is law, or if a *mandamus* can go in this case. There is no stopping short of the result that, if the Justices are not at liberty to satisfy their conscience by receiving evidence, their jurisdiction must be limited, in the absence of a police objection, to require proof of the service of the prescribed notices; an order of adjournment must be just as

(1) [1896] 2 I. R. 15.

much in excess of jurisdiction as an order refusing the certificate, showing on its face that the applicant was a drunkard, a lunatic, or a convict. I agree with the Lord Chief Justice and Gibson, J., that the condition as to the right to refuse to give the certificate as to character, and as to the suitability of the premises is identical. It depends upon, and it is created by, "the self-same words of the same section." The certificate is one and indivisible, though it certifies to two things. But from this I infer that its issue is not compellable, unless and until the applicant offers sufficient evidence to satisfy the Justices that it is true. If he fails to do this, *Morgan's Case* (1) decides that the Justices can and ought to call on the police to enter an objection, and may thereupon refuse the certificate. It does not appear where the Court found the duty of the Justices to thus call on the police, nor the duty of the police to obey. Not being bound, as the Judges in *Morgan's Case* (1) were, by the Queen's Bench decision in *Marshall's Case* (2), I hold that the magistrates, may *a fortiori* refuse the certificate if they know it to be false, and that, if they are in doubt, they can and ought to make inquiry, and receive any available evidence openly given on oath in Court, to remove the doubt. This is not receiving an objection from an unauthorised party. It is not acting *ex informata conscientia*. The magistrates, by asking for further evidence to satisfy them of a fact which it lies on the applicant to establish before he can call on them to certify it, do not thereby become objectors. They act more fairly to the applicant by receiving such evidence than by acting on their own knowledge, or refusing the application on the ground of insufficiency of evidence. Apart from the words of section 5, which I shall presently discuss, the substance of the matter is best seen by considering what "good character" means. It means "good public reputation." The Act takes two magistrates of the district as specimens, or representatives, of the applicant's neighbours, and the right to a licence is given to any one who can get two such magistrates to certify, according to their knowledge information and belief, that he is of good repute among his neighbours. The restriction of the power of objecting

(1) [1896] 2 I. R. 318. (2) [1896] 2 I. R. 15.

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to the police, is intended as a protection to the applicant against sudden, irresponsible, malicious, or indiscriminate attacks upon his character, but it does not relieve him from the condition of finding two magistrates, whose knowledge and opinion of him enable them conscientiously to certify that his character is good. Lefroy, C. J., in *Dillon's Case* (1), describes the nature of the magistrate's duty under a similar statute, by comparing it with that of a master who ought to give a character to a servant who deserves it. *Molloy's Case* (2) shows that such a duty cannot be controlled by *mandamus*. The *Hamstall Case* (3) shows that Justices ought not to exercise such a power without inquiry, nor implicitly assent, far less expressly certify, to a matter of public interest, without examining into the circumstances. In the *Ashburton Case* (4), Campbell, C. J., said that when Justices refused to sign their assent, which was in the nature of a personal guarantee as to character, under the statute of apprentices, they could not be compelled to do so, and that an application for a *mandamus* could not be "listened to for a single moment." It seems to me to be clear, that unless section 5 amounts to an express enactment that every applicant *shall* be entitled to the certificate unless the police object, the appeal cannot be sustained; and the section, as I read and understand it, says no such thing. It contains three clauses :—

> I. "The sub-inspector of the district, or, in his absence, the head constable, is hereby authorised to object before the Justices at Petty Sessions to the issue of such certificate."

This clause gives a *locus standi* to the police, which they would not otherwise have. It does no more.

> II. "The Justices shall, *in such case*, proceed to consider, examine on oath into, and adjudicate" (not upon the application, but) "upon the truth, sufficiency, and validity of such *objection*."

This clause affirmatively compels the Justices to try out the question between the applicant and the police, *in case* the police object. It makes a *lis* of the objection, but it says nothing

(1) 11 Ir. C. L. R. 232.
(2) 10 Ir. C. L. R. 80.
(3) 3 T. R. 380.
(4) 4 E. & B. at p. 532.

about the duty of the Justices or about the *onus* on the applicant, where there is *no* objection. I cannot hold that it implies, necessarily or at all, a positive prohibition to receive any evidence, or that it affirmatively confers an absolute right to a certificate, where there is no objection, far less that it compels the Justices to certify what they know to be untrue.

The last clause is merely consequential on the second.

III. "If such Justices shall be satisfied of the truth and sufficiency of any such objection, they may refuse to grant such certificate."

This clause empowers the Justices to give effect to the police objection, if established to their satisfaction. It cannot, in my opinion, be converted by implication into an affirmative enactment that, in every other case, the certificate must be granted. I agree with Murphy, J., that these provisions "could never have been intended to nullify actual knowledge possessed by the Justices themselves, as to the applicant's character," or to compel them "by virtue of their office, to subscribe to what they know to be a lie." Gibson, J., thought that "the mistake into which the Bench fell was excusable. They were not apprised that their function was that of automatic machines, provided for the emission of certificates, without regard to truth." I prefer the interpretation which Madden, J., put upon the statute, relegating the theory of *automata* to the Cartesian philosophy whence it came, and regarding "the provision of the 5th section as applicable to the proper subject matter of an objection, but as inapplicable to the duty and obligation cast upon the magistrate by the 3rd section, independently of any objection, to certify truthfully, in regard to a matter which intimately concerns the interests of the public, to the best of his knowledge, information, and belief."

Marshall's Case (1) in this Court has no bearing on the present question. The police, at that stage, had objected. The infirmity of the order appeared on its face, for it showed that the Justices had treated as "unsuitability" circumstances which the majority of this Court held not to be unsuitability within the meaning of the Act. The principle of the decision was the same as in *Clitheroe's Case* (2),

(1) [1895] 2 I. R. 174. (2) I. R. 11 C. L. 412.

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and the latest instance of a similar decision is *Evans* v. *Justices of Conway*(1). All these cases show only that in the absence of evidence, or upon evidence not legally sufficient or admissible, Justices cannot refuse to certify. None of them lends any colour to the proposition that *mandamus* will lie to compel Justices to sign a certificate which is proved to be false by the applicant's own evidence, or by evidence called for by the Justices, not as objectors, but to satisfy their consciences, when the applicant has failed to offer sufficient evidence of its truth. Far less do they support the proposition that, in Ireland, the silence of the police entitles every applicant as of right to a spirit grocer's or beerhouse licence, by compelling magistrates to certify what they have no reason to believe to be true, or that which they have on fair and open inquiry ascertained to be false.

References to the different statutes as to Publicans Licenses, and to the decisions on the English Code, are inconclusive, because the law is different. But it will be found that the differences of procedure, and of the restrictions upon objections in these other cases, do not touch the main ground upon which my judgment here rests. They do not establish the obligation of the Justices, in the absence of objection, to give a false certificate; they do not support the contention that, in the absence of objection, *mandamus* will lie to compel the magistrates to sign a certificate which is false; nor the contention that the acquiescence of the police confers a right, enforceable by *mandamus*, to a licence. They indicate no transfer of the licensing power from magistrates to police. These are the main points in this case. On them all, as well as on the minor points of abortiveness, of the existence of another remedy, and of the appellant's omission to take the present point at the proper time, when it could have been disposed of as it deserved by bringing in the police objection, my decided opinion is adverse to the relator. Lastly, so far as the application was subject to the provisions of the Beerhouses Acts, the amending Act of 1882, sect. 1, provides that "Notwithstanding anything in any Act now in force, the licensing Justices shall be at liberty, in their free and unqualified discretion, to refuse a certificate for any licence for sale

(1) W. N. 1900, p. 132 (June 16).

of beer by retail to be consumed off the premises, on any grounds appearing to them sufficient." This section applies to the certificate under the Act of 1864, sect. 2, under which the relator's affidavit states that he applied. It may not apply to the spirit grocer's certificate, though the Acts of 1872 and 1874 make it subject to the conditions prescribed by the Beerhouses Act, 1864. But be that as it may, the other reasons which I have given apply to the whole case, and have led me to the clear conclusion that the appeal should be dismissed with costs.

WALKER, L.J. :—

I am of opinion that the Justices acted outside their jurisdiction in refusing the grant of the licence for a spirit grocer, under the circumstances and in the manner they did. Their jurisdiction is conferred by statute, and, in my opinion, controlled by statute. The spirit grocer appears to have been the creation of the Irish Parliament in 1791, and for a period of eighty-one years his right to obtain a licence does not appear to have been subject to any statutory restriction. He obtained it as of right, without any obligation of going before Justices. As regards a publican's licence, on the other hand, the law from early times was different; stringent restrictions arising out of the conflict between the interests of the public revenue and public morals were imposed in the way of any person seeking it; and as regards him, any one of a numerous specified class might under the Act of 1833 have delivered a written objection, or orally stated one to the Justices, whether grounded upon the character, misconduct, or unfitness of the applicant, unfitness or inconvenience of the house, or place, or number of previously licensed houses in the neighbourhood, and the Justices inquired into and adjudicated upon evidence on oath into the truth, sufficiency, and validity of such objection, and if they were satisfied of it, refused the licence.

The jurisdiction of the Justices is defined and narrowed in the case of an application for a certificate for a renewal of a publican's licence by the 14th section of the Act of 1874. It provides that the Justices shall not entertain any objection to the signing of the certificate or receive any evidence with respect to it, unless a written seven-day notice of intention to oppose has

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been served on the applicant, stating in general terms the grounds of opposition, and any danger of injustice is averted by the provision that the Justices may, notwithstanding that no notice of objection has been served, if objection is made in Court, adjourn the signing the certificate to a future day, and require the attendance of the applicant.

In England the original discretion, vested in the Justices in the case even of renewals of publican's licence, is preserved, and is considered as underlying the legislation, and upon that view *Sharp* v. *Wakefield* (1), proceeded. In Ireland limits to the exercise of discretion appear in our code, and must be treated as subsisting, unless the House of Lords decide the contrary.

But as regards the more favoured spirit grocer, his right to get a licence was left free for many years; but by the combined effect of the 82nd section of the Act of 1872 and 9th section of the Act of 1874, and the provisions they incorporate, a condition is imposed on him of producing to the excise officer a certificate signed by two or more Justices of the Peace, presiding at the Petty Sessions of the district in which he resides, to his good character, and the suitability of the premises; as a preliminary to his application, he is obliged to serve a twenty-one day notice in writing on the sub-inspector of the district in which he resides, or in his absence the head-constable, stating his intention to apply, and setting forth his place of residence, and the situation and place of the house where he proposes to carry on the business. The section applicable then makes provision for hearing the application for the certificate, and its words are most important: "The sub-inspector of the district, or in his absence the head-constable shall be, and he is hereby authorized to object before the Justices at Petty Sessions to the issue of such certificate, and the Justices shall in *such case* proceed to consider, examine on oath into and adjudicate upon the truth, sufficiency, and validity of *such objection*, and if such Justices shall be satisfied of the truth and sufficiency of any such objection, they *may refuse* to grant such certificate." After the determination of the Justices, either party to the proceedings may, if dissatisfied with

(1) [1891] A. C. 173.

the decision or judgment given, appeal. If the Justices refuse the application, they are bound to specify the grounds of refusal, and no other grounds can, on the appeal, be entered into.

Having regard to the fact that the condition was one imposed for the first time in 1872 and 1874 on what had been before an unrestricted right, I see no difficulty in limiting the condition to the very case put—the objection of the accredited officer of constabulary. It is "in such case" the Justices are to proceed to consider, examine on oath into, and adjudicate upon the truth, sufficiency, and validity of such objection. It is on "such objection" that their jurisdiction operates, and they "may refuse," *i.e.* they are authorized to refuse, if they came to a conclusion hostile to the applicant on the subject-matter of their jurisdiction—"such objection." All difficulty is removed if we presuppose that the Justices are invested with absolute discretion apart from objection, but that is not so.

But then it is said—Are the Justices to be compelled to certify to a lie, and if they know that the applicant is not of good character, yet give him the certificate under their hand? In the first place, that is not the case with which we have to deal, for the Justices have refused the certificate without objection made, which I think they had no jurisdiction to do. I am willing to admit that they could have adjourned to see if the qualified person would object, and the 14th section of the Act of 1874 furnishes an analogy for that course. I do not think, however, notwithstanding the *obiter dicta* in *Re Dillon* (1), which was conversant with a quite different subject, viz. the stating of a case under the 20 & 21 Vict. c. 43, that the giving of the certificate is left to the discretion of the Justices, derived from their own knowledge, or knowledge acquired from sworn testimony initiated by their own action, or sprung at the hearing. Good character is a matter of opinion. The certificate they give is under the statute, and the statute assumes for the purposes of the certificate that there is good character sufficient to be attested when the responsible officer, whose duty it is to inquire, is satisfied, and makes no objection. I think that statute prohibits them from setting up their judgment

(1) 11 Ir. C. L. R. 232.

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against his until his objection comes before them as the subject of jurisdiction, and then they are free to deal with it according to their own judgment. It is said—What are they to do if an applicant appears before them intoxicated? Are they bound to grant it? I say certainly not. They can adjourn to obtain the authorised objection of the officer, which will always be given in a proper case. The applicant must give sufficient evidence of identity and residence within the Petty Sessions District to found jurisdiction; but when that is done, he has a *prima facie* right to ask for the certificate for a spirit grocer's licence, and obtain it if he is not opposed in the statutory way.

The authorities in England, on the cases of grant or renewal of a publican's licence are not, I think, applicable. There the applicant seeks a privilege, and the Justices have an absolute discretion in the interests of the public as to whether they will confer it or not. This is clearly pointed out by Lord Herschell, in *Boulter* v. *Justices of Kent* (1): "The question is not one *inter* parties at all," but "in favour of the public at large." Notwithstanding the case of *Sharp* v. *Wakefield* (2), it was held in *Evans* v. *Justices of Conway* (3), that in the case of applications for the renewal of a licence, if the Justices at Licensing Sessions refuse, and there is an appeal by the publican, the Quarter Sessions cannot refuse the renewal unless the licensing Justices appear to oppose, the burden of proof being on those who oppose the renewal.

I cannot distinguish in this part of the case between the suitability of the man's character for the business, and the suitability, structurally, of his premises for the business. Both are issues to be raised by an objection. As Gibson, J., says: "Character and suitability are linked together, and subject to the same objection, must be adjudicated upon in the same way, and the same appeal applies to both." I cannot therefore draw the distinction between the knowingly giving of a false certificate that premises are suitable, and a like one that a man's character is good. In each case the Justices would attest what, on the hypothesis, they supposed to be untrue. The want of the objection is, in both cases, made statutory evidence on the issue. For these reasons

(1) [1897] A. C. at p. 569. (2) [1891] A. C. 173.
(3) *Times*, May 31, 1900.

I agree in the decision of *Marshall's Case* (1) and *Morgan's Case* (2).

Two questions remain: 1. Was there a right of appeal? 2. If there was, ought the granting of the *mandamus* by reason of that to be refused? There is, I think, considerable difficulty as to the question whether an appeal existed. The words of the section are "either party to the proceedings may, if dissatisfied with the decision or judgment given, appeal," and I do not think the district inspector, who not only did not object to, but, on the contrary, supported the application, could be deemed a party to the *lis*. Nor do I think that either the Justices who were applied to, or the person who gave evidence before them, could, in a case like the present, be deemed "party to the proceedings." Licensing Justices in England, in the case of publicans' licences, are proper respondents to an appeal, but that, I think, arises from their position, and the discretionary powers, *ab initio*, vested in them.

The main ground of quarrel with the decision in this case would be that the Justices went outside their jurisdiction altogether, and had no subject matter before them with which they could deal, and this, I think, differs from the ground of appeal said to exist in *Rex* v. *Smith* (3) where the Justices having a subject matter before them upon which they could, on right grounds, adjudicate, decided to refuse the certificate upon a ground which they were not allowed by the Act to make the basis of a refusal. On the other hand there is great force in the reasoning of Gibson, J., that the injured party, even if there be only one party, shall have a right to quarrel with a wrong decision refusing him his certificate.

But even if there was a right of appeal I think a *mandamus* to hear and determine the case according to law could be and should be granted. There are a number of decisions granting a *mandamus* in licensing cases which cannot, in my opinion, be distinguished from this on any real ground. In *Reg.* v. *Sykes* (4) the Justices refused to state on which of the grounds mentioned in 32 & 33 Vict. c. 27, they had based their refusal, and it was held that *mandamus* should be granted,

(1) [1896] 2 I. R. 15.
(2) *Ibid.* 318.
(3) L. R. 8 Q. B. 146.
(4) 10 Q. B. D. 52

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as until they had done so they had not heard and determined the application according to law. So in *Reg.* v. *De Rutzen* (1) the Justices refused the application as it appeared the applicant did not intend to reside on the premises. This non-residence was not a disqualification, and a *mandamus* was granted on the ground that they had not heard and determined according to law. In *Reg.* v. *Howard* (2) the necessary written notice of an intention to oppose a renewal was not given, but the Justices refused the application and a *mandamus* was granted to hear and determine. So in *Reg.* v. *Thomas* (3) the Justices did not state the grounds of refusal and *mandamus* was granted, Wills, J., stating that the remedy by appeal could not be as satisfactory and effectual, and that there was such irregularity that the whole case ought to be reheard.

I am not aware of any case, save *Reg.* v. *Smith* (4), at least none was cited, where the doctrine of refusing a *mandamus* on account of the existence of another remedy was applied in a licensing case. In the Stamp Act Case, *Reg.* v. *Registrar of Joint Stock Companies* (5) and *Reg.* v. *Charity Commissioners* (6) the alternative remedy was much more convenient and effectual. The last case on the subject is *Reg.* v. *Cotham* (7), when the point was fully considered. There licensing Justices at a special transfer Sessions had power to licence persons "intending to keep inns theretofore kept by other persons being about to remove from such inns:" but they granted a licence by way of transfer from a person who was not and had not been in occupation of the premises and no excisable liquors had been sold there for many years. Wills, J., in granting the *mandamus*, says: "We have next to consider whether the case is one in which a *mandamus* ought to be granted directing the Justices to hear and determine the matter according to law. It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be very fine, and the cases on the subject show that it is so. I take the governing principle to be that if the Justices have applied themselves to the consideration of the

(1) 1 Q. B. D. 55.
(2) 23 Q. B. D. 502.
(3) [1892] 1 Q. B. 426.
(4) L. R. 8 Q. B. 146.
(5) 21 Q. B. D. 131.
(6) [1897] 1 Q. B. 407.
(7) [1898] 1 Q. B. 802.

section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of *mandamus*. That is so whether there is an appeal from their decision or not. If there is an appeal *mandamus* will not lie, if there is not their decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction and absolutely apart from the matters which by law ought to be taken into consideration then they have not heard and determined according to law." In the present case it is admitted that the point on which the Justices went wrong was never before their minds.

Kennedy, J., gave judgment to the same effect, adding that the Courts seem to have been more liberal in granting the writ in licensing cases than in most others, and he concludes: "Where as here they have disregarded the provisions of the statute which gives them jurisdiction, and have considered matters which they ought not to consider, then they have made themselves subject to the remedial powers of the process by *mandamus*."

In the present case I think we should grant a *mandamus* to the Justices to hear and determine the application according to law.

Inasmuch as a bill has passed the House of Commons which vests in the Justices free and unqualified discretion to refuse a certificate for a spirit grocer's licence upon any evidence they think fit the *mandamus* will be of little use to the applicant should that bill pass into an Act. On its frame if it passes (1) it is a legislative declaration that the decision appealed from was right so far as regards the main question involved.

HOLMES, L.J.:—

The principal question argued on the hearing of this appeal was, whether Justices presiding at Petty Sessions are at liberty to refuse a certificate of good character to a person desiring to obtain a spirit grocer's excise licence, where no objection has been made by any of the police officers referred to in the 4th and 5th sections of "The Beerhouses (Ireland) Act, 1864."

I am of opinion that this is the same point as that decided in

(1) 63 & 64 Vict. c. 30.

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The Queen v. *Marshall* (1), and *The Queen* v. *Morgan* (2). It is true that these cases related to the certificate as to the suitability of the premises; but I am unable to follow the reasoning that seeks to distinguish such a certificate from the certificate of character mentioned not only in the same section of the Licensing Act (Ireland), 1874, but in the same sentence of that section. The ethical argument in favour of permitting a magistrate to act upon his own responsibility in giving a certificate under his hand, seems to me to be equally strong whether the matter certified is the goodness of a man's character, or the suitability of his house, while the difficulty of construction involved in holding that the two branches of the same certificate are subject to different conditions, is insurmountable. Whatever be the nature of the duty imposed, or the extent of the jurisdiction conferred on Justices by the 9th section of the Act of 1874, I am of opinion that the distinction drawn by two of the Judges of the Queen's Bench Division is untenable, and that this Court must now either follow or overrule *The Queen* v. *Marshall* (1), and *The Queen* v. *Morgan* (2). I was one of the Judges who heard the last of these cases; but feeling myself bound to follow the previous decision to which I was not a party, I cannot claim to have given it much independent consideration. I am therefore now in a position to approach the question with an open mind; and indeed, in any case, I should not be surprised that an opinion, however deliberate, on a difficult branch of the licensing laws, would not bear the test of re-examination. Gibson, J., refers ironically, in his judgment in the Divisional Court, to the intending spirit grocer as being, in this country, a favoured person who is regarded with partiality by Parliament. I may say, without irony, and as a mere matter of historical fact, that from the time when spirit grocers were first known, down to the year 1874, they, as compared with ordinary publicans, enjoyed exceptional advantages.

This class of licence originated in Ireland; and it is stated in Bateman's Excise Laws that the reason of its introduction by the Irish Parliament was to enable persons purchasing spirits in small quantities to procure them without having to resort to a

(1) [1896] 2 I. R. 15. (2) [1896] 2 I. R. 318.

public-house, and thus, I presume, to promote the cause of temperance. Be this as it may, there is no doubt that, while statute after statute was passed for the purpose of securing that publicans' licences should only be granted to men of good character, and that their business should be conducted in a respectable and orderly way, a grocer, as defined by the several Acts, was entitled to obtain, in the first instance, and to renew year by year afterwards, an excise licence to retail spirits in any quantity not exceeding two quarts at one time, to be consumed elsewhere than on the premises of the seller, without the certificate or order of any licensing authority. The first restriction placed on this right was by the 82nd section of the Licensing Act, 1872, which imposed upon a spirit grocer, as a condition to obtaining a renewal of a previous licence, the obligation of producing a certificate signed by two or more Justices presiding at the Petty Sessions of the district in which he resided, to the good character of the applicant, and to the peaceable and orderly manner in which his business had been conducted during the year next preceding the expiration of his former licence.

It will be observed that this provision does not apply to the first grant of the licence; and for two years longer the grocer, as defined, was entitled, if previously unlicensed, to obtain a spirit grocer's excise licence without any certificate. At length, by the 9th section of the Licensing Act (Ireland), 1874, the provisions of the 82nd section of the Act of 1872 were extended to a beginner with this difference, that in his case the certificate was to be both to the good character of the applicant and the suitability of the premises.

It follows, I think, from the language of these sections, even when looked at apart from all other provisions, that the certificates mentioned are not the expression of the individual opinions of the magistrates who sign them, but the records of a judicial tribunal —the Court of Petty Sessions—authenticated by the signatures of two or more of its members. It also follows as a corollary from this proposition that the Justices who compose the Court are not to allow themselves to be influenced by private knowledge or information, but that their judgment must be formed upon evidence given in the presence of the parties interested and in

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accordance with established rules of law. While agreeing with the conclusion arrived at *In re Dillon* (1), I must dissent from the dictum of Lefroy, C.J., when commenting upon 17 & 18 Vict. c. 89, sect. 11—an enactment practically identical with the sections now under consideration: "The party wanting the certificate applies to the local magistrates for it, just in the same way as a servant would go to his master for a character." This saying is, in my opinion, not only opposed to the language of the statute but is inconsistent with the judgment of the Queen's Bench Division in *The Queen* v. *O'Connell* (2), and cannot be reconciled with the granting by this Court of the writ of *mandamus* in *Marshall's Case* (3).

Continuing to confine myself to the two sections in question, I should infer from them, if no further guidance were afforded by the Legislature, that the applicant was in the first instance to establish by his own or other evidence a *prima facie* right to the certificate, that the Court ought then to hear such evidence as might be offered by any objector present, and that upon the facts thus proved, it ought to judicially determine whether the certificate was to be given or withheld. Such a mode of procedure would, no doubt, be inconvenient, and might sometimes lead to confusion, or, perhaps, injustice. That any unknown person, *de circumstantibus*, should be at liberty, without notice, to become an opposing litigant is, I think, objectionable in principle, but it is not a novelty in the licensing code, for between the years 1854 and 1874 it was permissible on the occasion of a publican applying to the Court of Petty Sessions for the certificate required before a renewal of his licence could be obtained: *Lambe's Case* (4).

I shall show presently that this state of things was remedied by the Licensing Act, 1874; and when the Legislature by that statute, as well as by the previous Act of 1872, prescribed certificates in the case of spirit grocers, it took care to make the procedure more systematic. Applications by spirit grocers for certificates under these Acts were to be made in the manner and subject to the like conditions as to appeals and otherwise (so far as the same were applicable) as were prescribed by

(1) 11 Ir. C. L. R. 232.
(2) 20 L. R. Ir. 621.
(3) [1895] 2 I. R. 174.
(4) [1897] 2 I. R. 57.

"The Beerhouses (Ireland) Act, 1864," in relation to applications for certificates under the said Act. This statute, for the first time, obliged retailers of beer for consumption elsewhere than on the premises of the seller, to obtain at Petty Sessions certain certificates as a preliminary to their application for excise licences; and its 3rd section corresponds to the 82nd section of the Act of 1872 and to the 9th section of the Act of 1874. Then follows the 4th section, which provides that the applicant shall give twenty-one days' notice to the sub-inspector or head constable of the district, stating his intention to apply, and certain specified particulars.

The next section authorises such sub-inspector or head constable to object to the issue of the certificate, and enacts that the Justices shall, in such case, proceed to consider, examine on oath into, and adjudicate upon the truth, sufficiency, and validity of such objection, and if the Justices shall be satisfied of the truth and sufficiency thereof, they may refuse to grant such certificate.

Section 13 provides that, after the hearing and determination by the Justices of any application for a certificate, either party to the proceedings before them may, if dissatisfied with their decision, appeal therefrom to the Quarter Sessions.

Taking these sections together, the intention and effect of the whole enactment seems to be exceptionally clear. The applicant having served his twenty-one days' notice, comes before the Petty Sessions Court. If the police officer, whose duty it is to make inquiries, and who has exceptional means of forming an opinion objects, the suit begins, and is determined judicially upon the evidence, the *onus* of sustaining the objection resting on the officer. If the latter does not object, it is assumed that the applicant is entitled to the certificate, and he obtains it without proof, just as a plaintiff on the trial of an action for recovery of lands is entitled to judgment without offering any evidence, if the defendant does not appear.

If this be not the construction, how is it possible to understand the provision as to appeal, which assumes that there are two persons in controversy with each other before the Justices, persons whom the preceding sections show to be the applicant and

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the police officer? Only two arguments have been advanced against this construction. The first, resting upon the ethical objection to a Justice being obliged to give a certificate of character which he believes to be undeserved, disappears, if I am right in holding that the document is not a testimonial from the individuals who sign it, but the record of a judgment of a Court. A legal tribunal is guided by rules of law and practice; and the first duty of its members is to see that its judgments are arrived at in conformity with such rules.

There is nothing "startling to the moral sense," to quote the words of Madden, J., for a Court of Justice to hold that a man's character is good, unless and until the *legitimus contradictor* proves the contrary. This seems to me to be the effect of the sections under consideration. The second argument relied on by the respondents, rests on an erroneous assumption, that the Justices are required to ascertain judicially the residence and the nature of the trade of the applicant, before they give the certificate, even when there is no objection. The sections contain no provision imposing this duty on the Justices, or relieving the officer of excise from performing it; and I understand that this was decided by the Queen's Bench Division in *Gilbey's Case* (1). Of course, if the certificate was refused on the ground of either non-residence, or of the applicant not being a grocer as defined, a writ of *mandamus* would be useless, if the disqualification existed, and would therefore, in such a case, be refused, but I am satisfied that the only matter which the Court has jurisdiction to inquire into in the absence of objection, is whether the prescribed notice has been duly served.

I attach no importance to possible, but improbable, results of the construction I have given the sections. No system, either of jurisprudence or of legal procedure, is perfect. It would be a scandal if the police officer, who can object up to the last moment, were to stand by and allow an intoxicated applicant to receive a certificate without objection. It would be equally scandalous if the character of a well-conducted trader were attacked in open Court, without notice or responsibility, by the malignant tongue of a rival in business. This and other abuses of the same kind

(1) [1897] 2 I. R. 559.

could not arise, if my view be correct; and if that view brings with it the risk of failure by a public officer to perform his duty, the latter is, I think, the lesser evil of the two.

The enactments with which I have been dealing are so clear in themselves that little help is needed in construing them from other provisions of the licensing code. It is, however, perhaps desirable to compare with them what is required when a publican applies for his original licence and for a certificate of renewal. The beginner must apply to the Court of Quarter Sessions, and before doing so he must give twenty-one days' notice in writing to the two nearest resident magistrates, to the police officer, and to the clerk of the peace; and must cause a similar notice to be published in a local newspaper.

Right to object is then given to any Justice of the Peace of the city or county, to the police officer, and to a churchwarden or other inhabitant of the parish, but to no one else; and it is provided that the nature of the objection must be specifically stated either in writing or orally, and thereupon recorded by the clerk of the peace. Here it will be observed that the persons who can object are limited, and provision is made that such persons should have due notice of the application. In 1874 publication in local newspaper took the place of notice to the two churchwardens as being a better means of informing the inhabitants of the parish. When we find in the same code that notice in the case of spirit grocers is only to be given to the officer of police, and that he may object, the analogy of the foregoing provisions affords a strong argument that he alone is the *legitimus contradictor*. Let me now turn to the renewal of a publican's licence. I have already pointed out that between the years 1854 and 1874 the 11th section of 17 & 18 Vict. c. 89, enables any person present at the Petty Sessions to object, without notice, to the granting of a certificate of renewal, subject only to the liability of being made respondent in case of an appeal under 18 & 19 Vict. c. 62. In 1874, it was thought that this general power of objection ought to be regulated; and accordingly, by the 14th section of the Licensing Act of that year, it was provided that no objection should be entertained unless a seven days' written notice of intention to oppose, and of the grounds of opposition was given to the applicant,

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provided, however, that notwithstanding that no such written notice had been served, the Justices might, upon objection being made in Court, adjourn the signing of the certificate to a future day, and require the attendance of the applicant. It is hardly possible to believe that the Legislature, while affording this protection to the publican, should almost simultaneously leave the spirit grocer, who had always been, in the words of Gibson, J., "a favoured person," at the mercy of a casual and irresponsible objector.

For all these reasons, I am of opinion that the Justices had no jurisdiction to refuse the certificate, and that the order made by them was illegal. I may add that I have not thought it necessary to refer to English decisions, for I have found on former occasions that the Licensing Laws differ so essentially in the two countries that little assistance can be gained from English cases.

I have only a few words to say about the other question argued. I am willing to assume for my present purpose that the writ of *certiorari* asked for is only ancillary to the writ of *mandamus*, although I think this is far from clear. I accept without hesitation the cases that decide that a writ of *mandamus* ought not to issue on the application of a litigant who might have the same remedy by means of an appeal, although here again I doubt whether the principle of these decisions would under any circumstances apply to this case even if it had been open to M'Kenney to appeal.

I am, however, obliged to differ from the Divisional Court by holding that in the circumstances of the present case no appeal lay. I have already anticipated what I have to say on this point. Indeed the two questions discussed seem to me to be interdependent. If I am right in holding that the Court could not begin the inquiry without an objection by the police officer, I am unable to see what subject matter there was for appeal. I have called attention to the language of the 13th section of the Act of 1864, which, I think, not only implies but declares that the appeal is only given where there are two litigants, one of whom is aggrieved. In this case there was neither suit nor litigant. Dr. Traill was no party to the proceedings. He had no doubt ceased to act as a magistrate. With strict propriety and in accordance with legal usage he had

left the Bench when he found that he could give what was believed to be material evidence. If he had communicated with the police officer, and if the latter by reason of such communication had felt himself justified in objecting, then his evidence and that of the two other gentlemen would have been given in a legal controversy to which there were two parties; but as it was they were merely *amici curiæ* mentioning matters which under the circumstances were irrelevant.

I have only to add that I do not think that the fact that no objection on the ground now relied on was taken at the time to the action of the magistrates is an answer to M'Kenney's application to the Queen's Bench Division. Neither silence nor even consent can give a Court jurisdiction; and there was nothing in the conduct of the applicant in this case which makes it inequitable for him to rely on his legal right. It is contrary to the practice of the Queen's Bench Division to give costs against Justices when they have acted in good faith; and I think that this rule ought to be followed by this Court in a case like the present where the Justices have appeared to support an order involving a question of procedure at Petty Sessions of great public importance. Since the foregoing was written I observe that a Bill has passed one of the Houses of Parliament authorising, as I have learned, the Justices to give or withhold at their discretion the certificate on the original application of an intending spirit grocer and enlarging the class of persons who may object on such occasion.

If this measure becomes law it will make the judgment now given by this Court of no importance in the future in a case like M'Kenney's, although it may still be of some value in dealing with certificates of renewal (1).

Solicitor for the Applicant: *M'Laughlin.*

Solicitor for the Justices: *Crookshank, Leech & Davies.*

G. Y. D.

(1) 63 & 64 Vict. c. 30.

Q. B. Div. Bankruptcy. 1900. Dec. 4.

In re DANIELL, a Bankrupt (1).

Bankruptcy—Debtor's summons—Act of bankruptcy—Adjudication—Subsequent payment of petitioning creditor's debt—Application to annul bankruptcy—Right of other creditors.

Where a person was adjudicated a bankrupt on the non-payment of a debtor's summons, and after the adjudication the amount was paid by a third person, who took an assignment of the debt, the Court declined to allow an application by the bankrupt to have the bankruptcy annulled, on the ground that there were other creditors besides the petitioning creditor, and that, in the absence of any consent on their part, the adjudication enured for their benefit.

The bankrupt, Mr. Louis Daniell, was adjudicated a bankrupt, the act of bankruptcy being non-payment by him of a debtor's summons. After the adjudication took place, the amount of the debtor's summons was paid by a friend of the bankrupt, who took an assignment of the debt. At the date of the adjudication there were other creditors besides the petitioning creditor.

The bankrupt applied to have the bankruptcy annulled, on the ground that, since the date of the adjudication, the debt due to the petitioning creditor had been paid.

R. Doyle, for the applicant, cited *Ex parte Bouchard, In re Moojen* (2); *Ex parte Jay, In re Powis* (3).

Boyd, J.:—

The act of bankruptcy in this case was the non-payment of a debtor's summons, and on this act of bankruptcy the debtor was duly adjudicated a bankrupt. Cause has been shown against the validity of this adjudication, on the ground that there is *now*, at the date of the hearing, no debt due to the petitioning creditor. It is not denied, that a debt sufficient to support the adjudication existed, when the debtor was adjudicated a bankrupt; but it is

(1) Before Boyd, J. (2) 12 Ch. D. 26. (3) L. R. 9 Ch. App. 133.

contended, that inasmuch as since the adjudication, the debtor has paid or arranged for the payment of the petitioner's debt, the bankruptcy should be annulled. I cannot assent to such a proposition. The present application is, to apply to the date of the bankruptcy the present state of facts, or in other words to make retrospective the effect of the present facts. It is argued that the act of bankruptcy being non-payment of a debtor's summons, no other creditor can take advantage of that act of bankruptcy, and therefore, that the other creditors, who admittedly exist in this case, would not be prejudiced by the allowance of the cause shown. It is true that such other creditors cannot take advantage of that act of bankruptcy; but they can, and are entitled to take advantage of the bankruptcy, which has been legally adjudicated. They were no parties to the subsequent dealings between the debtor and the petitioning creditor, and the adjudication was not made for the benefit of the petitioning creditor alone, but for the benefit of all creditors. To sanction such arrangements as have been made with the petitioning creditor in this case, would deprive the other creditors of the rights conferred on them by section 53 of the Bankruptcy Act of 1872, and by section 392 of the Act of 1857. This latter section appears designed to meet precisely such a case as the present, where a petitioning creditor takes advantage of his position, to secure for himself a payment in priority or in preference to other creditors. The Court cannot be a party to a proceeding, whereby an offence under this section would be condoned. Several cases have been decided in England, under analogous provisions in the English Bankruptcy Acts, and under the general law applicable to bankruptcy: *Ex parte Thompson* (1); *Ex parte Paxton* (2); *Ellis* v. *Russell* (3); *Davis* v. *Holding* (4).

The interval between the service and maturing of a debtor's summons was intended to provide for the settlement of the summoning creditor's debt, but after an adjudication in bankruptcy has been pronounced upon the petition of the summoning creditor, with whom no settlement has been effected, such adjudication enures for the benefit of all the debtor's

(1) 1 Ves. Jun. 157.
(2) 15 Ves. 461.
(3) 10 Q. B. 952.
(4) 1 M. & W. 159.

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creditors, and their rights thereunder cannot be prejudiced by any subsequent arrangement, made between the petitioning creditor and the debtor.

Mr. Doyle has informed me, that the debtor was at the date of the adjudication an uncertificated bankrupt, under an adjudication of the year 1886. This, however, in my opinion, does not affect the case. This debtor has been permitted to carry on trade since that time, and has in such subsequent trading incurred debts to the petitioner and several other creditors. To these debts the present proceedings will apply.

I, therefore, on the foregoing grounds, disallow the cause shown.

Solicitor for the applicant: *J. K. Toomey.*

J. MAC M.

WILLIAMSON *v.* ROVER CYCLE COMPANY, LTD. (1).

(1898. No. 10,867.)

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Jan. 23, 24. Feb. 16.

Sale of Goods Act, 1893, *sect.* 14—*Express guarantee—Implied guarantee of fitness—Implied guarantee as to quality of materials and workmanship—Sale of specified article by its trade name—Negligence—Evidence*—"Omnia sunt praesumenda contra spoliatorem."

The plaintiff purchased an "1896 Royal Rover" bicycle from Gass, a Belfast agent of the defendant company. The machine was described in the company's catalogue (which plaintiff read), and was in complete accordance with the description (or specification) therein. The catalogue contained an express guarantee excluding "the guarantee implied by statute or otherwise as to quality or fitness," and guaranteeing "that all precautions usual and reasonable have been taken to secure excellence of materials and workmanship," and undertaking to make good at any time within a year any defects in these respects. The catalogue stated that the company's "agents" had no authority to do more than sell goods purchased by them from the company.

More than twelve months after the purchase, the machine broke at the "crown" (the top of the steering-post or tube) and the plaintiff sued for damages, relying on (*a*) certain representations made by Gass; (*b*) the implied warranty under the Sale of Goods Act, 1893, section 14; and (*c*) the catalogue-guarantee.

After the accident the plaintiff had the break examined by experts, and then sent it to the company "for inspection." The company replaced the broken parts, and threw the broken pieces away. At the trial the evidence went to show that the break was a "clean" one—not the result of a flaw or defect in materials or workmanship. The jury found everything for the plaintiff. On new trial motion:—

Held, by Madden and Kenny, JJ., that the sale was of a specified article by its trade name, and that there was no implied guarantee as to fitness under section 14 of the Sale of Goods Act, and no evidence of any express condition or representation (Gass having no authority) as to this; that there was no evidence of breach of the catalogue-guarantee, as any evidence offered went to show at most only a defect in *design*, not in "materials or workmanship"; that the fact of the break therefore was not sufficient, and "*res ipsa loquitur*" did not apply; that the loss and non-production of the broken pieces by the

(1) Before PALLES, C.B., and MADDEN, and KENNY, JJ.

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defendants did not, under the circumstances (as plaintiff's experts had seen the pieces), make the defendants *spoliatores* against whom *omnia praesumenda*, or shift upon them the burden of proof; and that therefore a verdict should have been directed for the defendants.

Held, by Palles, C. B. (*dissenting*), that the defendants were *spoliatores* (even assuming the broken pieces to have been lost inadvertently), because the loss was, as against the plaintiff, wrongful, and because that which was lost *might* reasonably with the other evidence (the fact of the break) have been sufficient to support the plaintiff's case; that the case therefore could not have been withdrawn from the jury, and that the verdict for the plaintiff should be allowed to stand.

NEW TRIAL MOTION. The action, which was tried before Andrews, J., and a special jury of Dublin city on the 2nd and 3rd February, 1899, was brought for breach of contract in relation to the sale of a bicycle to the plaintiff.

The following statement of the facts in evidence is taken from the judgment of Mr. Justice Kenny:—

The defendants were a Cycle Manufacturing Company, with their place of business at Coventry, and a selling agency in Belfast. On the 23rd March, 1897, the plaintiff, who was an experienced cyclist, called at the agent's office in Belfast with the object of buying a new bicycle. The agent, Mr. Gass, was absent, but a clerk in the office gave to the plaintiff an illustrated and descriptive catalogue for the year 1897 of the defendants' machines. The plaintiff took the catalogue home and read it, and it is important to observe that his evidence is distinct as to his having read page 9, which contains the terms of the guarantee that constitutes the subject-matter of the amendment in the Statement of Claim made at the trial.

Having read the catalogue, the plaintiff, on the following day, again visited the shop, and saw Gass. Gass showed him all the machines for which he was agent. The plaintiff said he had a fancy for a "Rover." Gass recommended a "Trent." The plaintiff said he would like an "Imperial Rover." Gass replied that if the plaintiff wanted a good strong reliable machine, and one that would stand any amount of knocking about, the "Royal Rover" would be the machine for him. The plaintiff replied that he had heard of a few of these "Rover" machines breaking at the

"crown." Gass said the plaintiff was not to believe what he heard. The plaintiff, in his evidence, admitted that the "Imperial Rover" was a more expensive machine, and had improvements which the "Royal Rover" had not. The price having been agreed on between them, the plaintiff selected a "Royal Rover," and rode it home on the same day to his residence in Antrim-road, Belfast. From that date until October, a period of seven months, the plaintiff constantly rode the bicycle, having it out about four times a-week, and he would not deny that he had ridden it to Larne, a distance of about 25 miles, and back. He admitted that he never suggested that it was in any way defective. In October, 1897, the plaintiff, having to take up his residence in Leeds, left the machine behind him in Belfast, having first taken it asunder. He detached the front wheel from the front fork and left the parts, all but the forks and saddle, in the attic of his house at Belfast. In February, 1898, he caused the bicycle to be forwarded to him from Belfast to Leeds. From the time of its arrival he rode it constantly up to the evening of the 5th April in the same year, upon which night, after a start about 11 o'clock, p.m., and when going along what he states was a splendid road for a bicycle, slightly down hill, the steering-post of the machine broke at the bottom, just below the crown plate. He was going at the rate of from ten to twelve English miles an hour. As a result of the breaking, the front wheel became detached, and the plaintiff was precipitated on to the road. He was rendered unconscious, and suffered very considerable injuries. He further stated that he struck no kerbstone, or brick, or other object on the night of the accident, nor anything to cause such an injury to the machine.

The broken parts of the machine were not produced at the trial. The plaintiff's brother, Robert Williamson, having come over to Leeds on hearing of the accident, returned to Belfast about the 17th or 18th April, bringing with him the broken bicycle and all its parts. Gass came and inspected it, and had a conversation with Robert Williamson. The latter stated that Gass repeatedly asked him to let him have the bicycle for inspection. Williamson said he would have to communicate with his father first. Gass pressed his request, and it would seem from the evidence that eventually

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Williamson consented. Apparently the same day that this conversation took place, Gass sent a messenger for the broken bicycle, to whom it was given by Robert Williamson; and this apparently was the last that was seen by anybody on behalf of the plaintiff of the machine in its then condition. Robert Williamson further states that he repeatedly told Gass and the messenger that the bicycle was sent only for inspection. That the broken bicycle was sent for inspection received considerable corroboration from the correspondence that took place in the month of April. On the 20th April, Gass wrote to Mr. Frederick Warneford, who appeared to be an agent of the company, a letter in which he said that the plaintiff's father had been over with him "to see what we are going to do in the matter." On the next day, the 21st April, Gass again wrote to Warneford, "I have got Williamson's machine; shall I send it on to the works." On the same day plaintiff's brother wrote to Gass that "the plaintiff is not well enough to take the matter in hands himself, and I don't know if he would be satisfied if you replace the bicycle with a new one." On the 23rd April the defendants wrote to Gass, "*Re* Mr. Williamson; Mr. Warneford instructs us to send a new fork on to this gentleman; kindly let us know the size of his machine." On the 26th April the defendants again wrote to Gass, "With regard to Mr. Williamson's machine, we shall be glad if you will kindly return this, so that we can go further into the matter." On the same day Gass wrote to the defendants, "I have forwarded you this evening, *per* Barrow Steam Navigation Co., Mr. Williamson's machine for inspection." On the 28th April the defendants, in a letter to Gass, stated that the machine would be examined on arrival.

The machine was returned by the defendants to Gass, on the 10th May, repaired. The plaintiff's evidence, as to its condition when, as he said, he found it on that day in Gass' shop, was as follows:—"It was repaired; the steering post was not in the condition it had been in when broken. There was no sign of the accident. The steering post and forks were new, and the steering post was stronger than the one that was on it at the accident. There was a "liner" in the new steering post. There was no "liner" in the old one. The defendants did not send me back any part of

the old steering post and crown. I took the bicycle to my warehouse. From that out I have never seen any of the broken parts." After the plaintiff had seen the repairs, he, on the 17th May, 1898, applied to the defendants for payment of the expenses to which he had been put, without prejudice to any claim he might have for compensation for loss of time and personal injury. On the 28th May the defendants replied, repudiating any responsibility "other than guaranteeing the machine," and adding that they could do no more than replace any breakages, as they could not tell what ill-usage machines might be subjected to after they left their works. They, however, offered to exchange the machine for a new one. On the 7th June the plaintiff wrote saying he had expert evidence that there was a vital defect in the construction of the machine, and that it had never met with ill-usage. In a letter of the 22nd June, the plaintiff claimed that the defendants had admitted a "vital defect" by their having changed the steering tube by the insertion of the liner, to which the defendants replied that they had done so merely to make assurance doubly sure. On the 27th June, the plaintiff intimated that he would take legal proceedings, and on the 12th August his solicitors wrote to the defendants, cautioning them against tampering or interfering with or altering the "broken frame" of the machine. The correspondence, for all purposes material to the statement of the case, was closed by a letter of the defendants of the 18th August, 1898, in which they said that they had not retained the broken parts, that they received the bicycle from Belfast on the 26th April, that it was then repaired, and that the broken parts were put in the ordinary way on the scrap heap, which was cleared out weekly.

The catalogue, which the plaintiff had in his possession and read before he purchased the machine, in its introduction, stated that, except in a few details, no change has been made in the pattern machines of 1896 except where it was possible to reduce weight or to improve quality; but it pointed out that purchasers ran great risks in riding bicycles which were built for lightness alone, and without a due regard for the work they were intended for, or the weight they had to carry. An illustration was given of the "Royal Rover" (at page 17) with its weight and specification;

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and, at page 9, is contained the following statement of the guarantee which the company offered with their machines and of the authority of their agents:—

"GUARANTEE.—We give the following guarantee with our machines instead of the guarantee implied by statute, or otherwise, as to the quality or fitness for the purpose of cycling goods supplied by us; any such implied guarantee being in all cases excluded. In the case of machines which have been used for 'hiring out' purposes, no guarantee of any kind is given or is to be implied.

"We guarantee, subject to the conditions mentioned below, that all precautions which are usual and reasonable have been taken by us to secure excellence of materials and workmanship, and we undertake to make good at any time within a year any defects in these respects in our cycles. This guarantee does not apply to defects caused by wear and tear, misuse, or neglect.

"*Conditions of Guarantee.*—If a defective part should be found in any of our machines it must be sent to us by passenger train, carriage paid, and accompanied by an intimation from the sender that he desires to have it repaired free of charge under our guarantee, and he must also furnish us at the same time with the number of the machine, the name of the agent from whom he purchased, and the date of the purchase.

"Failing compliance with the above, no notice will be taken of anything which may arrive, but such articles will lie here at the risk of senders.

"We do not guarantee the specialities of other firms, such as tyres, saddles, chains, lamps, gear-cases, bells, etc., supplied with our cycles or otherwise. We endeavour to secure the highest quality of these articles, and the makers whose names usually appear thereon are in nearly every case willing to replace any defective part, and we will at all times furnish the maker's name as a proof of the quality.

"*The term Agent* is used in a complimentary sense only, and those firms whom we style our agents are not authorised to advertise, incur any debts, or transact any business whatsoever, on our account, other than the sale of goods which they may purchase from us."

The action was not brought in respect of a breach of that guarantee. The statement of claim disclosed three causes of action. The first, for breach of a warranty and representation of fitness (by the defendants' agent); the second, for fraudulent representation of fitness (by the defendants' agent); and the third, a somewhat curious one—for breach of a representation as to fitness. The defendants pleaded that the only guarantee they had given was that set forth in their catalogue, and that there had been no breach of it. At the trial, the plaintiff, having given the

evidence already referred to, deposed that he bought and got a "Royal Rover," that he had read its description on page 17 of the catalogue, that he had examined one similar to it before he bought it, and also examined the one he bought; that he did not know how long it was since liners had been first introduced into steering tubes; that they had been in use for two years; that the repairs were not done by his consent; that the break was a perfectly clean one; that there was no trace of a flaw of any kind; and that he saw no defect in the welding of the tube. The plaintiff's brother saw the bicycle after the accident. He said that the steering-post was broken at the crown—"a complete break"—"it had no liner in it, the steering post of the repaired bicycle has an inside liner and is decidedly stronger." Mr. Luke Montgomery, a friend of the plaintiff, and a cyclist, who also saw the machine, said that the bottom of the steering post was snapped apparently clean off, that the break was at the junction of the steering post with the forks, and that the latter were uninjured. The last, and one of the most important witnesses, was Mr. Thomas Ireland, who gave expert evidence. He was the manager of a cycle merchant's establishment, and familiar with all the parts of a bicycle. He made a most critical examination of this machine after the accident, presumably with the view of afterwards giving evidence, if necessary, as to the cause of the break. He said he formed the opinion that the tube was rather light and that it should have had a liner or a graduated tube, that is, a tube thickened with heavier metal towards the crown. He could not say whether the steering-post had an imperfect joint, or whether the brazing was imperfect. "The break was a clean one and was not at the brazing." He admitted that, when he looked at the broken frame, he said, "That was done by a collision."

The case for the plaintiff having closed, counsel for the defendants asked for a direction and declined to go into evidence. The learned Judge declined to direct on the first and third counts, but directed for the defendants on the second (fraudulent misrepresentation). Counsel for the plaintiff then applied for and obtained leave (counsel for the defendants objecting) to amend the statement of claim by relying on the catalogue-guarantee (which the defendants had pleaded in their defence), leave being given at

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the same time to the defendants to plead to the amendment as they might be advised. Counsel for the defendants asked for a direction upon the amended claim on the ground that there was no evidence of breach of the catalogue-guarantee. His Lordship declined to direct, and left to the Jury the following questions, to which their answers are here given:—

1. Did the plaintiff at the time of the sale to him of the bicycle in question make known to the defendants' agent, Mr. Gass, the particular purpose for which it was required so as to show that he relied upon the defendants' skill and judgment? *Answer*, Yes.]

2. Was the contract for the sale of the bicycle to the plaintiff, in fact, a contract for the sale of a specified article under its trade name? [*Answer*, No.]

3. Was there an examination by the plaintiff of the bicycle at the time of the sale which ought to have revealed the alleged defect in the steering-post if it existed. [*Answer*, No.]

4. Was Mr. Gass the agent of the defendants in the sale of the bicycle to the plaintiff? [*Answer*, Yes.]

5. Did Mr. Gass at the time of the sale represent to the plaintiff in substance and effect that the bicycle was then reasonably fit and proper to be used for riding by the plaintiff? [*Answer*, Yes.]

6. If so, was the plaintiff thereby induced to buy the bicycle? [*Answer*, Yes.]

7. Was the bicycle then reasonably fit and proper to be used for riding by the plaintiff? [*Answer*, No.]

8. If not, did it by reason of its not having been, when sold to the plaintiff, in March, 1897, reasonably fit and proper to be used for riding by the plaintiff, break down when he was so using it in April, 1898? [*Answer*, Yes.]

9. Before the sale had all usual and reasonable precautions been taken by the defendants to secure excellence of materials and workmanship in respect of the said bicycle? [*Answer*, No.]

10. If not, did it, by reason of such usual and reasonable precautions not having been taken, break down while the plaintiff was using it for riding in April, 1898? [*Answer*, Yes.]

11. Did the plaintiff sustain loss and injury by the break-down in April, 1898? [*Answer*, Yes.]

12. If so, assess his damages for the loss and injury he so sustained. [*Answer*, £120.]

After the jury had retired, *Bushe, Q.C.*, for the plaintiff, asked that a further question be put to the jury as to whether the bicycle at the time of the sale was of merchantable quality, but the learned Judge declined then to add any further question to those already sent to the jury. *Gordon, Q.C.*, for the defendants, objected to his Lordship's charge to the jury in regard to the second question. His Lordship reported that the effect of this portion of his charge was, "that if they (the jury), found on the evidence that the actual contract was not the mere contract referred to in the second question, but a contract with further stipulations, such as a guarantee by the defendants that all usual and reasonable precautions had been taken by them to secure excellence of materials and workmanship, and if they found on the evidence that there had been a representation in fact made at the sale, by which the plaintiff had been induced to buy, to the effect that the bicycle was reasonably fit and proper to be used by him for riding, it would not be the contract referred to in the second question, which in that case should be answered in the negative; but if they found upon the evidence that the contract was merely one for the sale of a specified article, viz.: a Royal Rover bicycle, under its trade name of a Royal Rover bicycle, they should answer the second question in the affirmative." Defendants' counsel did not, however, formulate what in their view the learned Judge should have told the jury.

The learned Judge directed and gave judgment for the defendants on the second count (fraudulent misrepresentation), and for the plaintiff with £120 damages upon the rest of the claim in accordance with the findings of the jury, staying execution on the terms of the defendants bringing £120 into Court.

Counsel for the defendants now moved for an order, that the verdict and findings of the jury, and the judgment entered thereon be set aside, and judgment entered for the defendants,

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or for a new trial on the grounds of misdirection; that the findings were against evidence and the weight of evidence; that there was no evidence proper to be left to the jury on the original or amended claim; that the plaintiff should not have been permitted to amend after the close of his case, and that a verdict should have been directed by the learned Judge in the defendants' favour.

Gordon, Q.C., Campbell, Q.C., and *Hume, Q.C.*, for the defendants.

The Right Hon. The Macdermot, Q.C., Bates Q.C., and *Jeaffreson*, for the plaintiff.

The following authorities, in addition to those referred to in the judgments, were cited during the arguments: *Behn* v. *Burness* (1); *Heyworth* v. *Hutchinson* (2); *Derry* v. *Peek* (3); *Prideaux* v. *Bunnett* (4); *Burnby* v. *Bollitt* (5); *Wilson* v. *Dunville* (6).

Cur. adv. vult.

Feb. 16.

KENNY, J.:—

This case comes before us on the defendants' application to set aside the verdict and judgment entered for the plaintiff, on the grounds of misdirection of the learned Judge, before whom the trial took place, and that the verdict was against evidence and the weight of evidence, and that there was no evidence to sustain the causes of action in the statement of claim as amended by the Judge at the trial.

[His Lordship stated the effect of the evidence as above given, and continued—]

It seems to be clear, from the evidence, that the plaintiff purchased a machine of a well known type, with a well known trade name—that he was intimately acquainted with its character and design—and that he got the special type of bicycle that he

(1) 3 B. & S. 751.
(2) L. R. 2 Q. B. 447.
(3) 14 A. C. 341.
(4) 1 C. B. (N. S.) 613.
(5) 17 L. J. (N. S.) Ex. 190.
(6) 4 L. R. Ir. 249.

asked for. No evidence was given that it differed in any particular from its description and specification at p. 17 of the catalogue. That specification contained no provision whatever for a liner in the steering tube, and no evidence was given that a liner was, at the time the plaintiff bought his machine, recognized, or even thought of, by the trade or the public, as a proper, usual, or reasonable precaution in construction or workmanship. The class of evidence submitted by the plaintiff also establishes that, before he parted with the broken machine, in order that the defendants might inspect it, he had submitted the broken parts to the examination of experts, and was able to appeal to their testimony with reference to the character of the fracture, the construction and workmanship of the steering tube, and the defects which, in their judgment, existed in the machine and led to the accident.

At the close of the plaintiff's case at the trial, and after counsel for the defendants had made their requisition for a direction in their favour, an amendment of the statement of claim, relying on what I may call a catalogue-guarantee, was applied for, and, in my opinion, properly granted. The defendants went into no evidence, and the learned Judge, having directed a verdict for them on the cause of action for fraudulent representation, left a number of questions to the jury, all framed, except Nos. 9 and 10, with reference to the 14th section of the Sale of Goods Act, 1893, and the alleged oral guarantee or representation of Gass. Questions Nos. 9 and 10 were framed with reference to the catalogue-guarantee. The jury found for the plaintiff on every point submitted to them.

The course of the argument before us became extremely narrowed as it proceeded, and eventually it was, I think I may say, conceded on behalf of the plaintiff, that the real point for decision was whether there was evidence to go to the jury of a breach of the catalogue-guarantee. That again resolved itself into the question whether the mere fact of the breaking of the steering tube was, under the circumstances deposed to, *prima facie* evidence of a breach sufficient to throw on the defendants the obligation of answering it, if they could do so. Lest, however, any doubt should exist as to the concession I refer to,

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I may say, without going into my reasons, that I entertain a very clear opinion, notwithstanding the findings of the jury, that the contract in the present case was one for the sale of a specified article under its trade name, that there could be no implied condition as to its fitness for any particular purpose, and that there was no evidence of any express condition to that effect. The catalogue excludes the notion of the possible existence of any representation or condition other than the express guarantee given by it. I therefore hold that judgment should be entered for the defendants on the three causes of action in the unamended statement of claim.

The main question remains, Was there evidence to go to the jury of a breach of the catalogue-guarantee? Unless the principle of *res ipsa loquitur* applies, I can find none. It lay on the plaintiff to make out at least a *prima facie* case that there was a defect of materials or workmanship, and that the defendants had omitted to take some usual and reasonable precaution to provide against such a defect. It must be remembered that the defendants are not insurers of their bicycles against all defects, and that their guarantee is not an unqualified one of soundness, and cannot be pushed farther than that they will take reasonable care to secure excellence of materials and workmanship, having regard to the weight and character of the particular machine. If a "liner" had been recognized as a usual and reasonable precaution, as a means of strengthening the steering-tube in machines of 1896, and the tube broke in consequence of its absence, or if it appeared that the tube ought to have been, and was not, subjected to some known test that might have disclosed the alleged defect, there would, in my opinion, have been direct evidence to go to the jury of breach of the guarantee: *Burrell* v. *Tuohy* (1). But no such evidence is forthcoming. It has been suggested that the fact of the defendants having repaired the bicycle and inserted a "liner" is evidence of a breach, but the answer to this is that the defendants' guarantee contemplates repairs where defects manifest themselves within a year from the purchase; and the existence of a defect does not imply

(1) [1898] 2 I. R. 271.

the absence of due precautions to provide against it. So far, therefore, as direct evidence of a breach is concerned, I can find none. This case is in many of its aspects not unlike that of *Hanrahan* v. *Ardnamult Steamship Co.* (1). There, an employee of the defendants, while unloading a cargo, was killed by the fall of a derrick which was being hoisted by a rope which worked through an iron bolt, which it appeared was in a defective state; but its condition was unknown to the defendants. No evidence was given as to the length of time such a bolt ought in ordinary course to remain in repair, or as to the necessity for periodical inspection. So, here, we have no evidence as to the length of life of a bicycle or its several parts; we only know that it was constantly ridden for about nine months. The judgment of the Court in the *Ardnamult Case* (1) was given by my Lord Chief Baron. He stated what the defendants' duty was, namely to use due care to provide and maintain a reasonably fit and proper bolt. The question there was as to maintenance. Here it is as to provision. There, an admitted defect existed. Here I will assume, for the purposes of contrast, that there was a defect in the steering-tube. The Chief Baron lays it down that it was the duty of the plaintiff to establish affirmatively a state of facts from which a jury might conclude, by reasonable inference, that there was a breach of duty on the defendants' part in not using due care to maintain the bolt in repair. Applying that dictum to the present case, it was the plaintiff's duty to establish affirmatively a state of facts from which absence of due care to secure excellence of materials or workmanship might be reasonably inferred, and he has given no evidence whatever for arriving at such a conclusion, unless the mere occurrence of the break is to afford *prima facie*, though not conclusive, evidence.

In the *Ardnamult Case* (1), no question of *res ipsa loquitur* was discussed or even raised. It is argued, however, that the rule applies in the present case, and the ground for its application is put largely on the circumstance of the defendants having either lost or destroyed the parts of the machine. The result of the cases in which the rule has been applied has been summed up at p. 132 of 1st Beven

(1) 22 L. R. Ir. 55.

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on Negligence, and shows that they are divisible into two classes: the one, when the injurious agency is under the management of the defendant, the other, when the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. It is plain that the present case does not come within either of those categories; the latter one of which is, I may observe, very fully discussed by my Lord Chief Baron in *Flannery* v. *W. & L. Railway Company* (1). The jury in the present case have found that "the usual and reasonable precautions" contemplated by the catalogue-guarantee had not been taken, and the question is whether there was reasonable evidence of the absence of those precautions. The plaintiff had not shown, or even suggested, that there was something which the defendants ought to have done, and which they had omitted to do. This machine was out of their possession for a year, and it is just as reasonable to suggest that in that period it met with a start or strain in some of its parts which might have caused the fracture, or that the fracture was the result of inevitable accident, as to suggest that "the usual and reasonable precautions" were not taken. If the evidence is equally consistent with the existence or the non-existence of negligence, if each of the alternative inferences is equally consistent with the facts proved, the case should not be left to the jury. On the evidence here, I would be inclined to go the length of holding that the inference of inevitable accident, or of an injury to the machine received after it was purchased by plaintiff, is more probable than that the usual and reasonable precautions had not been taken.

But, assuming the alternative inference to be equally consistent with the facts proved, it is contended that the destruction or loss of the parts of the machine by the defendants, shifts the *onus* of proof, and casts on the defendants the obligation of negativing the absence of usual and reasonable precautions. In other words, that the maxim, *omina presumuntur contra spoliatorem*, applies. But are the defendants *spoliatores* in the sense in which the word is used in the maxim. I think there can be little question that, if there was a wrongful destruction of the parts—

(1) Ir. R. 11 C. L. 30.

a destruction effected for the purpose of concealing the truth, or of deliberately embarrassing the plaintiff in his proofs—the *onus* might be shifted. I doubt very much whether the maxim is applicable in the absence of circumstances suggestive of motive or of a wrongful destruction. Can it be said that here the parts were destroyed because the defendants apprehended that they would be tangible evidence of the truth that would have operated against them. In the Scotch case of *Rooney* v. *Allan* (1), where the injury was caused by the breaking of a chain, the defendants' manager had flung the chain into the Clyde. Lord Young characterized the act as an indiscreet one, because it excluded the possibility of a scientific examination. In this case the plaintiff is not deprived of evidence by the absence of the broken parts. Before he parted with the broken machine, he caused it to be examined by several persons, including a scientific witness. All these parties gave evidence on his behalf, and describe the break as a clean one. Moreover, the substantial case made for the plaintiff is that the steering-tube was too light in its construction, and there is not a suggestion of defective workmanship or materials in the particular type of machine. I do not forget that the bicycle was sent to the defendants for inspection, and that apparently the plaintiff did not contemplate repairs; but at the same time I cannot draw an inference of bad faith on the part of the defendants, or of any intention to destroy evidence. They are not, in my opinion, *spoliatores*, and, even if they were, it is difficult to say what additional light the production of the broken parts would have thrown on the case, or what weight it could have added to the evidence of the witnesses produced on behalf of the plaintiff.

I am, therefore, of opinion that the verdict and judgment should be entered for the defendants.

MADDEN, J.:—

The verdict in this case, in the view that I take of it, imposes upon the defendants the responsibility of insurers, notwithstanding the fact that their contract with the plaintiff was based upon the

(1) 10 Rettie, 1224, 1227.

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express and limited guarantee contained in the catalogue. The plaintiff failed to prove the warranty upon which he declared in the first paragraph of the statement of claim, or to establish any authority in the defendants' agent to extend the terms of the limited guarantee. The count for fraudulent misrepresentation was altogether unsupported by evidence, and the argument finally narrowed itself to a discussion of the question whether there was any evidence proper to be submitted to the jury of breach of what I have called the limited guarantee. If there was any such evidence, I think, for the reasons which I shall state presently, that the verdict ought not to be disturbed.

The defendants expressly guarantee that all precautions which are usual and reasonable have been taken to secure excellence of materials and workmanship. They expressly exclude any other guarantee, implied or otherwise. The plaintiff alleges that the breaking of the bicycle, under the circumstances proved in the case, is in itself some evidence that excellence of materials and workmanship had not been secured. This being so, he contends that it rests on the defendants to show that they had taken all precautions which are usual and reasonable, in order to secure an excellence that did not in fact exist. I think the last mentioned contention is well founded, for the reasons which were stated in *Scott* v. *The London, &c., Docks Company* (1). The defendants have left us in the dark as to the precautions taken by them. This is a matter specially within their own knowledge; and they have made no attempt to sustain the burden of proof which would, in my opinion, rest upon them if there were evidence of a defect in materials or workmanship.

There remains the question, does the occurrence in itself afford evidence of the existence of such a defect? Under certain circumstances, the mere happening of an event has been held to afford evidence of a state of facts in the absence of which that event could not reasonably have been expected to occur. *Res ipsa loquitur.* Thus the fact that portion of a railway train left the rails is, in itself, *prima facie* evidence of negligence on the part of the railway company, because (as the Lord Chief Baron points out in his

(1) 3 H. & C. 596, 601.

judgment) it is "impossible to say that it is in the ordinary and accustomed course of things that a waggon should leave the rails when all reasonable precautions are taken": *Flannery* v. *W. & L. Railway Co.* (1). Again, the mere fact of the breaking of the ring of a buoy, exposed to no unreasonable strain, was held by this Court to afford evidence of negligence on the part of Harbour Commissioners who were bound, under their bye-laws, to provide buoys adequate for the ordinary purposes of the harbour: *Burrell* v. *Tuohy* (2). Similarly, the snapping of an axle-tree, by reason of which a passenger was injured, was held to throw upon the owner of the coach the burden of showing that the coach "was as good a coach as could be made, and the driver as skilful a driver as could anywhere be found": *per* Mansfield, C.J., in *Christie* v. *Griggs* (3). And, if the plaintiff had succeeded in proving the warranty pleaded in the first paragraph of the statement of claim, I should have been prepared to hold, on the authority of these cases, that the break-down of the bicycle, unexplained by the defendants, was, in itself, sufficient evidence to sustain the verdict.

But, when we come to apply the principle of these authorities to the facts of the present case, we must be assured that the occurrence upon which the plaintiff relies warrants the inference which he asks us to draw. The steering post of his bicycle broke clean across, with the result that has been described. I shall assume that it was being ridden with ordinary care. I shall also deal with the case as if the breakage had occurred shortly after the purchase of the machine. In fact, the bicycle had been in use for more than a year, the period during which the defendants' guarantee remains in force so far as regards their liability to make good any defects that might be discovered in respect of materials or workmanship. The guarantee is subject to certain conditions, one of which is that any part found to be defective should be sent to the defendants to be repaired free of charge under the guarantee; this could only be done within the year; and, if there were nothing else in the case, it would be a matter for consideration

(1) Ir. R. 11 C. L. p. 37. (2) [1898] 2 Ir. R. 271. (3) 2 Camp. 79.

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whether the guarantee (which is not to apply to defects caused by wear and tear) remains in force for a longer period.

Assuming, however, but not deciding, this point in favour of the plaintiff, let us see what inference can fairly be drawn from the breaking of the bicycle. The happening of the break, at the point where it occurred, under the circumstances which I assume, affords *prima facie* evidence of a defect in the bicycle. But of what kind of defect? A machine of the kind may be defective in point of workmanship, of material, or of design. If the defect in the present case was of the last-mentioned kind, the defendants would not be responsible. Liability for insufficient strength, if it be the result of the structure and design of any particular kind of bicycle, is excluded by the limited guarantee contained in the catalogue, in the introduction to which purchasers are warned that they run great risks in riding bicyles that "are built for lightness only, and without a due regard for the work they are intended to be put to, or the weight they have to carry." How to combine lightness with sufficient strength and stability, appears to be the problem which the designers of bicycles endeavour to solve. As we should expect, improvements are made from time to time, and it is in evidence that recently-constructed machines are strengthened, at the very point at which the plaintiff's broke down, by the insertion in the steel tube of what is known as a "liner."

Now, so far as the mere fact of a fracture is concerned, it is quite plain that it might have been caused by a defective design, throwing undue weight upon the particular part of the machine which gave way. It might, no doubt, have been the result of bad material or careless workmanship. But where each of three hypotheses is admissible as an explanation of an occurrence, no inference can be drawn in favour of any one hypothesis from the mere fact of the happening of the event. In all the cases where the principle *res ipsa loquitur* has been applied, the language has been unambiguous.

Something more, therefore, than the breaking of the tube seems to be necessary to establish the plaintiff's case. But when I get beyond *res ipsa*, and consider the plaintiff's evidence, it

tends to negative the conclusion which he asks us to draw. The plaintiff thus describes the fracture:—"It was a perfectly clean break. There was no trace of a flaw of any kind. I don't know that a defective weld would show in a fracture. I saw no defect in the welding of the tube." His brother says, "The steering post had no liner in it. The steering post of the repaired bicycle has a liner inside, and is decidedly stronger." Mr. Ireland, another of the plaintiff's witnesses, who has been in the bicycle trade since 1891, saw the broken steering post. He says:—"I formed the opinion that the tube was rather light, and that it should have had a liner or a graduated tube, that is, a tube thickened with heavier metal towards the crown. I think the graduated tube is the best. My opinion was and is that there should have been either a graduated tube or a liner."

I asked The Macdermot whether the defect complained of was a defect of material or of workmanship. He said, of both, but laid greater stress upon workmanship; and rightly, for there is really no evidence whatever of the use of inferior metal. If the workman had been also the designer of the type of bicycle, he would have been in default, according to Ireland, whose evidence must be accepted as conclusive, in default of any on the other side. But the workman would have no authority to depart from the design of the machine, by constructing a tube of a different degree of thickness, or strengthened by the insertion of a liner, with the inevitable result of adding to the weight. His business was simply to work out the patterns supplied to him. The plaintiff's evidence, so far from suggesting inferiority in workmanship or material, appears to point to a defect in the design, by reason of which strength was sacrificed to lightness.

No degree of excellence in materials or workmanship could have prevented the destruction of the earlier Tay Bridge. It broke down because it proved too weak at a vital point. A different design has been successfully substituted, just as an improved and strengthened steering post has been introduced into this make of bicycle, but in neither case does the catastrophe suggest inferior material or bad workmanship.

So far I have considered the case apart from a question of

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evidence, which, if it was decided in favour of the plaintiff, would deprive the judgment of the Court of any general significance, although it would suffice to maintain the verdict of the jury. It is contended that the non-production by the defendants of the broken parts of the bicycle, sent to them by the plaintiff, is sufficient to raise a presumption against them, that the parts, if produced, would sustain the plaintiff's case. If this were so, the burden of proof would be shifted, and the verdict, so far as it is founded on the express guarantee, ought to stand. The circumstance that, on this branch of the case, I find myself unable to concur with the Lord Chief Baron, has led me carefully to examine the evidence in the light of the authorities that have established the general proposition that a party from whom evidence has been kept back, which, if produced, might have established his case, is entitled to call upon the Court to draw an inference in his favour from the mere fact of the suppression of the evidence. *Omnia praesumuntur contra spoliatorem.* Now I quite agree that a party who destroys or suppresses evidence, is a "*spoliator*" of evidence within the meaning of this maxim, although he may have had no improper motive at the time. It would be sufficient, I think, if the effect of a wrongful act had been to deprive the plaintiff of evidence by which his case might be supported. I also agree that the loss or destruction of the broken parts of the bicycle by the defendants would, under certain circumstances have brought them within the operation of this rule of evidence. But I do not think that their action, in the circumstances of the present case, entitles the plaintiff to draw the inference which would be necessary to support his case: that is to say, that the break occurred by reason of defective material or workmanship. The plaintiff had the broken pieces in his possession from the 5th of April, the date of the occurrence, until the 20th. The break was examined by his witnesses. One of them, Mr. Ireland, was an expert in bicycles, having been in the trade for several years, and was examined as such; and others were practically acquainted with cycling. The plaintiff's examination of the broken pieces had been evidently concluded when he sent them to the defendants for examination by them; for,

although he complained of the non-production of the pieces, he never suggested that he had been prevented from having them fully examined. If the broken pieces had been throughout in the possession of the defendants, the burden would, I think, have rested upon them of giving evidence as to the character of the fracture, as being a matter specially or exclusively within their own cognizance. But the circumstance that the plaintiff had a full opportunity of examining them, and did in fact submit them to several witnesses, seems to exclude the application of the principle to which I have referred.

The plaintiff's solicitors wrote, on the 12th of August, cautioning the defendants against interfering with or altering the broken frame. At that time the repairs had been long since done, as the plaintiff well knew. The defendants replied that they had received the bicycle from Belfast on the 26th of April, that it was then repaired, and the broken parts put on the scrap heap in the ordinary way. The plaintiff got back his bicycle repaired by the defendants on the 10th of May. He had afterwards a correspondence with the defendants, and, while he now complains that a machine, which he sent for inspection only, was wrongfully repaired by the defendants, he never refers to the matter in any of his letters, although the subject of repairs is referred to by the defendants in their letters of the 28th of May, and of the 8th and 23rd of June. I presume that when a bicycle is repaired, the damaged and useless pieces are thrown upon the scrap heap in the absence of express directions to the contrary. It would have been prudent on the part of the defendants to have given those directions, although litigation had not been threatened at the time, for by their destruction they have placed themselves in the hands of the plaintiff's witnesses. Fortunately they are truth-speaking, and they prove nothing suggestive of bad materials or defective workmanship. I do not think that the conduct of the defendants, in failing to preserve the fragments of the broken steering post, is sufficient in itself to raise a presumption that it was defective in materials or workmanship, and as there is no positive evidence of breach of the limited guarantee, I think that the verdict ought to be entered for the defendants.

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PALLES, C. B.:—

Upon the substantial question in this case, viz. the right of the plaintiff to maintain his verdict, I find myself unable to agree with my learned brethren.

It is little more than a matter of form upon which cause of action the verdict shall be entered; but for accuracy's sake I may state that I am of opinion that the causes of action in the original statement of claim are not maintainable. The prospectus which was the basis of the contract, by express words, negatives the implied contract sued on. I am of opinion, however, that the amendment of the statement of claim was properly allowed, and that there was evidence to go to the jury in support of the cause of action thus introduced.

The warranty, then, with which we have to deal, viz. that stated in the amendment is that (subject to certain conditions) "all precautions" which were "usual and reasonable have been taken by" the defendants "to secure excellence of material and workmanship."

I should not have referred to these conditions were it not that Mr. Justice Madden doubts whether the warranty I have mentioned is not limited to defects which become apparent within a year. I cannot concur in those doubts. I hold that in the contract there are two and independent terms. The first—viz. that all precautions which are usual and reasonable as to excellence of material and workmanship have been taken—is, in my opinion, unlimited as to time, and, if broken, entitles the purchaser to damages, not necessarily limited to the cost of repairing the defect. The second term is contained in a separate clause of the sentence commencing with the words, "and we undertake to make good at any time within a year any defects in these respects in our cycles." In my opinion the words "within a year" do not govern the guarantee mentioned in the first clause.

Taking the cause of action stated in the amended statement of claim, I agree that the mere fact of the fracture of the steering post, at the time and under the circumstances proved, is not, *per se*, any evidence of the breach of such a warranty; and I should have been of the same opinion, even if the warranty had excluded

all question of reasonable care, and had been that the materials and workmanship were in fact excellent. In relation to warranties of this class, I abide by the observations I made in *Hanrahan* v. *Ardnamult Steamship Company* (1), as to the necessity of the evidence of skilled witnesses. The general public, as represented by the jury, cannot, as it appears to me, be deemed to have, at least at the present time, such knowledge as to the length of time during which a cycle such as that in question ought to be capable of being safely ridden, or as to the necessity of a "liner" in the steering post, to enable them to find a verdict involving those questions, upon such evidence as they had here. The principle of the *Ardnamult Case* (1) appears to me to be as applicable in a case in which the strength of a bicycle is involved as it was there, where the matter of investigation was the strength of the iron rigging of a ship.

But, granting all this, the evidence of the fact of the fracture in the present case is supplemented by the non-production by the defendants of the broken pieces of the steering post, which they state have been lost or destroyed. The loss or destruction by the defendants of these broken pieces, if they have in fact been lost or destroyed (which is only alleged, but not proved), or their non-production, if they were in fact forthcoming, in my clear opinion, shifted the onus of proof from the plaintiff to the defendants. Had those broken pieces been forthcoming, they might have been submitted to skilled witnesses who might have been able to give evidence as to the compatibility of the actual fracture with excellence of materials and workmanship; and from the loss, destruction, or non-production of these pieces, the jury would, in my opinion, have been well justified in presuming, if they thought fit so to do, that the pieces, had they been forthcoming, would have shown that the fracture was one inconsistent with the excellence guaranteed, and further, inconsistent with usual and reasonable precautions having been taken to secure such excellence.

In arriving at this conclusion, I do not hold affirmatively that the pieces were destroyed or withheld intentionally, with a view to suppressing evidence. Such an inference, were it necessary

(1) 22 L. R. I. 63.

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that it should be drawn, would have been one for the jury, and for them only. It cannot be material on the preliminary question which we have here, viz. whether the matter should have been submitted to the jury. No objection was made to the manner in which Andrews, J., in his summing-up, dealt with this topic, in case it were one for the jury at all.

Further, I am of opinion, that it is not necessary, in order to support the verdict here, that the jury should have arrived at any inference of wilful suppression, although, upon the evidence, I think that they were at liberty to do so, if they thought fit. All that I think necessary to lay a foundation for the application of the well-known maxim, "*omnia praesumuntur contra spoliatorem*," is that the loss or destruction is, as against the plaintiff, wrongful; and that that which was lost, destroyed, or not produced, *might* reasonably, with the other evidence, have been sufficient to maintain the plaintiff's case. Where, as here, loss or destruction is not affirmatively proved, the unexplained non-production operates even more cogently against the defendants. I do not propose to refer to cases illustrating the various circumstances in which the most just and necessary rule involved in this maxim has been applied. But I feel bound to say that I cannot concur in the view of Kenny, J., that the rule does not apply in the absence of circumstances suggestive of motive. Correcting the note to *Wardour* v. *Diresford* (1) according to the statement of Sir George Jekyll, in his judgment in *Cowper* v. *Cowper* (2), and the extract from the Registrar's book referred to by him, it would appear that in the former case, whilst the Master was of opinion that the alleged destruction of the accounts was wilful, the Lord Chancellor, upon the hearing of exceptions to his report, after having had the witnesses examined before him, founded his decree upon the loss or destruction having occurred through the "carelessness" of the defendant; and on this ground he wholly disallowed the defendant's claim. The application of the rule in such a case, appears to me to be a necessary corollary from the more general principle of the civil law, that no man can place himself in a better position by his own wrong: "*nemo ex suo*

(1) 1 Vernon, 452. (2) 2 P. W. 746.

delicto meliorem suam conditionem facere potest." If the production of evidence, which by reason of a party's wrongful act cannot be produced, might reasonably sustain the case of his adversary, then, unless that adversary did succeed in maintaining his case, the wrong-doer might be benefited by his own wrong. I purposely use the word "might," as distinguished from "would," because when evidence is not forthcoming, it is often, as it was in the present case, uncertain what its exact weight might have been. The additional risk thus involved I hold to lie on the wrong-doer. Viewed in this, its very mildest, light, the rule operates, not so much as punishment, but as the provision of an equivalent for that which has been wrongfully taken away. I need not say, however, that loss, destruction, or non-production, may, and in practice often does, lay sufficient grounds for much more serious inferences; especially if it be not clearly shown that the wrongful act was not intentional. I refrain, however, from entering into these considerations, as they are for the tribunal which has to determine the matter of fact.

I proceed to show that, in the present case, the non-production, or the destruction, of the fragments was wrongful.

The plaintiff's brother delivered the cycle to Gass, the defendants' agent, for inspection. Gass, when forwarding it to the defendants, stated explicitly (in his letter of 26th April, 1898), that it was sent "for inspection." The company, in acknowledging Gass's letter, stated that it "shall be examined on arrival"; and long previous to its arrival, they had been informed, not only of the plaintiff's serious injuries, but that it was doubtful whether he would be satisfied by the bicycle being replaced by a new one: see the letter, Williamson to Gass, 21st April, 1898. Thus, they had actual notice that the plaintiff might make a claim for personal injuries sustained by him through the breaking down of the cycle. The defendants, as I have already observed, gave no evidence of the loss in fact, nor did they produce the persons by whom the cycle was examined when it arrived at their works.

Under these circumstances, I am at a loss to see how the learned Judge could have excluded from the case the application of the above maxim; or how we can hold that, if it were applicable, the jury would not have been at liberty to presume that

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the broken pieces would or might have evidenced a want of excellence in materials or workmanship, which usual or reasonable precautions would have rendered apparent before the sale: and, in my opinion, the observations that have been made by my brethren upon this part of the case, affect the weight, not the existence of evidence.

I understand my learned colleagues attach some weight to the statement in the letter of 7th June, 1898:—"I have expert evidence that there was a vital defect in the machine." This statement appears to refer to the evidence of Ireland. In my opinion, the fact of the break being a clean one does not necessarily decide the case in favour of the defendants, nor can we in my opinion say, as matter of law, that the plaintiff had, by Ireland's inspection, all the advantage that might have attended its production in Court, and its examination by expert witnesses capable of giving testimony as to the cause of the fracture. I deem it right, however, to add that, even if I arrived at an affirmative conclusion upon this question, I would still hold that the non-production of the pieces would render the question one for the jury, and not for the Judge.

I am therefore of opinion that the verdict upon the cause of action introduced by amendment should stand, with the damages assessed by the jury, the verdict upon the other causes of action being *pro forma* entered for the defendants. But as my learned brethren are of a different opinion, their view must, of course, prevail, and judgment be entered accordingly.

Solicitors for the plaintiff: *M'Lean & Son.*
Solicitors for the defendants: *Carson & M'Dowell.*

J. H. P.

THE QUEEN (COUNTY COUNCIL OF KILDARE) *v.* COMMISSIONER OF VALUATION AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY (1).

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May 12, 14. June 19.
Appeal. July 28, 30.

Rates—Railway—Valuation—Re-valuation made without notice requiring a revision—Estoppel by conduct—Valuation Acts, 15 & 16 Vict. c. 63, and 17 Vict. c. 8, ss. 4, 5.

Certiorari lies to remove a revised valuation if made by the Commissioner of Valuation in excess of, or without, jurisdiction.

Unless and until a revised valuation is got rid of, either on appeal or by *certiorari*, the rate must be struck according to such valuation.

The County Council of Kerry having called for the revision of the portion of the Great Southern and Western Railway Company in the county of Kerry, the Commissioner of Valuation re-valued the entire line, and fixed a revised valuation, not only upon the portions in the county Kerry, but on the portions also that were situate in the other counties through which the line ran, including county Kildare. In the result, the valuation of the entire line was, as a whole, increased, but the valuation of the portion in the county of Kildare was diminished. The County Council of Kildare appealed to the Commissioner of Valuation for a re-hearing, but the Commissioner refused to alter his valuation. The Kildare County Council then appealed to the County Court Judge, but the notice of appeal did not state want of jurisdiction as a ground of appeal. The County Court Judge affirmed the valuation as to the main line, but varied it as to a branch line of the railway within the county. On application for a writ of *certiorari* to quash the revised valuation lists, and the order of Quarter Sessions, as being made without jurisdiction:—

Held, by the Queen's Bench Division, that the revision of the portion of the railway in the county of Kildare, not having been made upon any application (under 17 Vict. c. 8, s. 4) by any ratepayer or collector in that county, was made without jurisdiction, that the order of Quarter Sessions must fall with it, and that the writ must go.

Held, by the Court of Appeal, that (assuming the revision was without jurisdiction) the Kildare County Council were estopped by their conduct from raising the question, and that the order for a writ of *certiorari* should have been discharged.

(1) In the Queen's Bench Division before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

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CERTIORARI.

In 1899 the Kerry County Council served notice under section 4 of the Valuation (Ireland) Act, 15 & 16 Vict. c. 63, requiring a revision of the Great Southern & Western Railway Company. The Commissioner of Valuation proceeded to make the valuation in May, 1899, and in doing so he first valued the entire line, and then proceeded to divide the amount apportionable to the different counties. The total receipts of the line were ascertained on an average for three years, from which the landlord's and tenant's deductions were made. The sum arrived at was £156,000, which was divided between (*a*), stations and buildings; and (*b*), the line itself. Every station and building was valued separately; and the total of these valuations was then subtracted from the total value of the line itself. This was then divided over the railway as follows:—The Commissioner divided the line into sections of equal traffic as regarded the section itself. A return was then procured from the Railway Company of the train-miles run in each of the sections during the months of January and July; these two months being selected so as to get the summer and winter traffic. The Commissioner then divided the whole valuation of the line between the sections according to the proportion of train-miles run in each. He then calculated the rate per perch on each of these particular sections: and then valued every townland along the line according to the number of perches of each section of railway in each of them at the rate per perch for each section; and the valuation of the railway in the townlands in each rating area so ascertained, added to the valuation of the railway stations and buildings in the same area, he declared to be the railway valuation of the district.

The preceding valuation of the Great Southern & Western Railway was made by Sir Richard Griffith in 1860, who valued the entire line at £140,000.

In 1899, the Commissioner valued it at £156,000. The value of the portion of the line running through Kerry was increased, but the portion running through Kildare was decreased from £29,925 to £23,966 15*s*.

A copy of this valuation was sent to the Kildare County Council, who appealed to the Commissioner to reconsider his valuation. When the case was heard, the Kildare County Council

challenged the valuation as having been made without jurisdiction, on the ground that no notice was received from the Secretary of the County Council, or of any District Council, or from any Board of Guardians in the county. The Commissioner refused to alter his valuation, and in August, 1899, the County Council appealed to the County Court Judge for Kildare. The grounds of appeal were that the trunk line and a branch were both severally valued by the Commissioner of Valuation, and that the valuation ought not to have been altered unless it was proved that there had been such a decrease in the traffic receipts, or increase in the expenditure on the respective sections of the said line, since the last valuation was made, as would justify the reduction of the old ratings; that the valuation by mileage was illegal; and the months selected for ascertaining the engine mileage, viz. January and July, being two of the slackest in the year, would tell not only against the portion of the line nearest Dublin but particularly against that portion of the railway in the Athy district; and that the number of engine miles run without regard to the number of carriages or waggons attached to the engine was unfair to the county of Kildare, and that a scheme of ton mileage ought to have been adopted instead of engine mileage.

The case was heard before His Honor Judge Kane, who confirmed the valuation as to the main line, but varied it as to the branch line. The Kildare County Council applied to the Queen's Bench for a writ of *certiorari* to quash the revised valuation on the ground that the same was made without jurisdiction.

Falconer, Q.C., and *D. Kehoe*, for the applicants.

The Solicitor-General (*George Wright*, Q.C.) and *Vesey Fitzgerald*, for the Commissioner of Valuation.

Ronan, Q.C. and *D. G. Chaytor* for the Great Southern and Western Railway Company.

Cur. adv. vult.

June 19.

PALLES, C.B. :—

Although the questions argued in this case are serious ones, I do not think we should derive any benefit by allowing it to stand

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for further consideration, and I therefore proceed to give judgment. In it, we have one net question of law; and also some matters of form, which have been put forward with a view to prevent us arriving at this question of law and the justice of the case.

The question of law is whether there was jurisdiction in the Commissioner of Valuation to make the revision in question.

The points of form relied upon are—(*a*) the allegation that, when the appeal was first made to the Commissioner, his attention was not called to this question; and (*b*) that the notice of appeal to the Quarter Sessions omitted to rely upon the alleged want of jurisdiction of the Commissioner.

Later on, I shall deal with these matters of form; but, in the first instance, I shall take the question of right.

Is this valuation binding upon the county of Kildare? Was it one which the Commissioner of Valuation had authority to make?

This question is, in my opinion, free from all doubt. The questions of doubt and difficulty arise upon the bye questions, upon the questions of form. In my opinion, no person can read the 4th and 5th sections of the Act of 1854 (17 Vict. c. 8), without coming to the conclusion that the Commissioner had no power to make this revision of the list of rateable hereditaments in the county of Kildare.

The subject matter of the valuation is the portion of the railway which lies within the local limits of that county. The jurisdiction to make the revision of the valuation of this part of the railway is under the 4th section of the Act I have mentioned. If the revision is not authorised by that section, it was made without jurisdiction, as undoubtedly the case was not within section 20 of the Act of 1852 (15 & 16 Vict. c. 63).

The 4th section of the Act of 1854, as amended by the Order in Council under the Local Government Act, 1898, commences by enacting as follows:—

> "For the purpose of providing for the necessary revision of the valuation of the rateable tenements and hereditaments, the limits whereof shall become altered, and also of rateable tenements or hereditaments the annual value of which is liable to frequent alteration, such as fisheries, *railways*, . . . every collector of poor rate *within each county*

. . . shall make out and deliver to the *Secretary of such County Council* . . . to be by him laid before the council of such county . . . a list of all the tenements or hereditaments situate within every townland *in the said county* and within his district, *the valuation of which tenements shall require revision for any of the reasons aforesaid* . . . and any ratepayer within any part of the county . . . may within the same period make out and deliver to the Secretary of the County Council . . . to be by him laid before the council of the county, . . . a list of any tenements *the valuation of which shall in his opinion require revision.*

Then it is provided that the Secretary shall for ten days leave any list received by him open for public inspection at the offices of the County Council, and permit extracts to be made therefrom; and—

> "Shall, on or before" a specified day, . . . "make out a full and complete list of tenements and property *mentioned in such lists* delivered to him as aforesaid on or before" the proper day; "and transmit the list so made out by him to the Commissioner of Valuation, *with the opinion of the said County Council* . . . whether such revision is necessary on account of such changes or alterations."

Then, by section 5, it is enacted:

> "After the receipt of such lists for the county, the Commissioner of Valuation shall cause a revision to be made of the valuation of the tenements in the several townlands within said county or county district, and appoint fit and proper persons to revise the valuation of *the tenements so requiring revision*; . . . and as soon as *the said revision* shall have been completed the Commissioner of Valuation shall make out and prepare a revised list or lists of the valuation of the rateable hereditaments and tenements within such county or county district . . . or a list of the tenements *so revised as aforesaid*, and shall sign the same, and shall transmit printed or written copies of such list or lists so signed by him, in the form set forth in the Schedule to the first of the hereinbefore mentioned Acts annexed, to the Council of each county . . ."

Thus the only subject matter in respect of which the Commissioner of Valuation is entitled to exercise his judgment in the way of revision is "the tenements so requiring revision," *i.e.*, the rateable hereditaments mentioned in the list of the Secretary of the County Council—a list which ought to be confined to such tenements as are mentioned in the several lists of the collectors and ratepayers. It is as to these tenements, and these only, that the Commissioner of Valuation can have, under

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section 4, the opinion of the County Council as to the necessity of revision.

Now, what has been done here? The railway extends through the greater part of the south of Ireland. Some collector or rate-payer served a notice, under section 4 of the Act of 1854, on the Secretary of the County Council of Kerry, requiring a revision of the valuation of the part of the railway situated in that county. That notice gave jurisdiction to the Secretary of the County Council of Kerry to include this railway in a list which was sent by him to the Commissioner of Valuation, and the receipt of this latter list gave jurisdiction to the Commissioner of Valuation to revise the valuation of *that portion* of the railway which was situated in the *county of Kerry*. He, however, did more. In addition to revising the valuation of the part in the county of Kerry, he also revised the valuation of a totally different subject matter, viz. the part of the railway in the county of Kildare. In my opinion, he had no jurisdiction to do this. Indeed, the only argument we have heard in support of his jurisdiction is the last one mentioned by Mr. Chaytor, who argued that, according to the correct mode of valuing a railway, you must first ascertain its valuation as one entity, as one existing subject matter, whereby one annual sum of money is earned, and, having ascertained the amount of the rateable valuation of the railway as a whole, that then you must proceed to subdivide that amount according to certain principles, and by this means arrive at the proportion of the amount of the valuation of the entire which ought to be apportioned to the part within each county.

I assume and believe that it was necessary for the Commissioner of Valuation, in exercising his jurisdiction in relation to the portion of the railway in the county of Kerry, to ascertain the valuation of the railway as a whole; but it was necessary for him to arrive at that valuation, not for the purpose of revising a valuation list of that railway as a whole, or of revising the valuation lists of all the counties through which the railway passed, but in order to determine one factor to enable him to arrive at that which alone he was empowered to determine judicially, viz., the valuation of that part of the whole that lay in the county of Kerry. I am clearly of opinion that the necessity for calculating the value

of the whole, as ancillary to determining that of the part, did not give him the jurisdiction which, under sections 4 and 5, he would have had if notices under the Act had been served in the several counties through which the railway runs, including Kildare. I hold that although, in the exercise of his jurisdiction in relation to the part in the county of Kerry, he may have, or has, acquired, knowledge of what ought to be the revised valuation of the part in the county of Kildare, upon which, possibly, he may act when he acquires jurisdiction, yet, that as things then stood, he had no jurisdiction to alter the valuation of the part in the county of Kildare, or in any wise to act upon the calculation he had made, otherwise than by doing that which he was directed to do by section 5, *i.e.* revise the valuation of the part of the railway in the county of Kerry.

Therefore, upon the merits of this case, I think the matter free from doubt. I now come to the matters of form:—

The existing revised valuation which appears to be in force in the county of Kildare, *i.e.* the valuation sought to be quashed, rates this Railway Company at an amount less than that of the former valuation; that is, at a sum less than that at which, in my opinion, they are now legally liable to be rated. Therefore, as between them and the ratepayers who are represented by the County Council, there is, in fact, an injustice. Every ratepayer in that county, so long as this valuation is acted upon, will be obliged to pay a greater amount of rates for his rateable hereditament than, in law, he ought to pay. This proceeding by *Certiorari* is taken to rectify this error; and the first objection taken to it is that the valuation is not a subject-matter as to which, according to the rules of this Court, *Certiorari* can go.

I am very clear that a *Certiorari* can issue to bring up a valuation of this description. The scheme of the Act is that as soon as the valuation is made, and when all appeals against it have been determined, it is transmitted to the rating authority; and the Act enacts that every rate, made after a prescribed period thereafter, shall be made upon that list. I need not stop to consider whether, if there be a list made under such circumstances, that in law it is not a list within the meaning of the Act, as this is, it would not be competent to the rating authority to disregard it as a nullity,

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and to make a rate upon the old list, as if it were still subsisting. That raises a question into which I do not wish to enter; because to sue for the rate upon the old valuation, the revised one having been affirmed at Quarter Sessions and remaining unquashed, would be an act the risk of which the County Council are not bound to incur. If the revision be without jurisdiction, and be a judicial act, it is no answer to an application for a *Certiorari* to show that its validity could be questioned in an action. In my opinion, the revision is a judicial act. Not only is the valuation in the first instance to be made according to the judgment of the Commissioner, but every ratepayer has a right to bring the matter before him by way of appeal. From his decision upon such appeal a further appeal is given to a judicial tribunal, the County Court; and ultimately it has the effect, if valid, of imposing "an obligation upon individuals," to use the language of Lord Esher, M.R., in *Regina* v. *Local Government Board* (1).

The next point raised is, that even if we have jurisdiction to grant the writ, we should not do so under the circumstances of the case.

The law has been well settled, especially in recent years, although indeed the leading case of *Regina* v. *Justices of Surrey* (2) is no more than a re-affirmance of the common law, which possibly had been somewhat departed from in some cases decided in previous years. The law was there laid down by Lord Blackburn in the clearest way, that where the right of an individual is prejudiced by any decision of an inferior tribunal, *Certiorari* is a matter, not of discretion, but of right; that it is in the nature of a writ of error from the judgment of an inferior tribunal. No doubt, the right to question such a decision can, like the right to question any judgment, be lost by the conduct of the party. The doctrine can apply in this instance as well as in any other. My practice, however, in considering whether conduct is of such a character as to disentitle to a *Certiorari* a party actually prejudiced by the unauthorised decision of an inferior tribunal, is to see whether that conduct is such as to render it unjust to the opposite party to grant him that to which he would otherwise have been

(1) 10 Q. B D. 317. (2) L. R. 5 Q. B. 466.

entitled. The writ, in my view, ought to be granted, unless his conduct has been such that, by granting it, injustice would be done to some one else.

In the present case the Commissioner of Valuation knew, as did also the Railway Company, that no notice had been served to revise the valuation of the part of the railway in the county of Kildare. There is a conflict of testimony as to whether this particular point was brought under the notice of the Commissioner or not; but both he and the Railway Company knew the facts from which ensued the legal result that he had no jurisdiction to enter upon the inquiry as to the revision for that county. The matter was pointedly brought before the County Court Judge; and the prosecutors certainly cannot be bound by subsequent conduct; so that it really comes to this, that the objection grounded on want of jurisdiction was omitted from the notice of appeal. No doubt, the objection, if stated in the notice, would have been open upon appeal; and, in my opinion, it would have been much better had it been stated. But I hold, for reasons which I will state when I refer to the order of the Quarter Sessions, that notwithstanding section 23 of 15 & 16 Vict. c. 63, which limits the consideration of the Quarter Sessions to "the matter of such appeal as stated in such notice," that this objection, as it went to the root of the jurisdiction of the Quarter Sessions, was open to their consideration, and ought to have been entertained by them. In this Court we constantly make orders, when we have jurisdiction to do so, on notices defective in matters of form; and I am not prepared to say that, by serving too limited a notice of appeal, the applicant lost his right, not of appeal, but of *Certiorari*. Had the Quarter Sessions yielded to the objection as to want of jurisdiction, and had the Railway Company applied for a *mandamus*, the question upon that motion would, in my opinion, be identical with that now before us; and will any one say that a *mandamus* could have been issued to a tribunal which had no jurisdiction to proceed.

So far as to bringing up the revision of the valuation. Can we then bring up the order of the Quarter Sessions on the appeal? In other words, was that order made wholly without jurisdiction? It is said that the jurisdiction of the Quarter Sessions was limited

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by the notice of appeal, and that it had no jurisdiction to consider anything outside it. The condition necessary to give the Quarter Sessions jurisdiction to hear and determine was the service of a notice of appeal; and if a valid notice of appeal were served, and if there were existing a proper subject-matter in respect of which the jurisdiction of the Quarter Session was capable of attaching, its jurisdiction would be limited to the matter of the appeal as stated in the notice of appeal. My opinion, however, is that it was inherent in its jurisdiction to inquire into objections to a revision, and indeed obligatory upon the Quarter Sessions to see in the first instance that there was that which in law amounted to a revision; that is, that the actual revision was the result of an inquiry upon which the Commissioner of Valuation had jurisdiction to enter. I think that the appeals which the Quarter Sessions had jurisdiction to entertain must be limited to appeals from the revision of valuation of such tenements as had been comprised in a notice served by the Secretary of the County Council under section 4 of the Act of 1854; and that where, as here, the tenement of which the valuation was revised was not comprised in such list, there was such a total want of jurisdiction that the matter was *coram non judice*, that the Quarter Sessions had no more power to enter upon the inquiry than if the tenement were in a different county. I hold that as it appeared at the Quarter Sessions that the tenement was not included in a list served by the Secretary under section 4, that Court had no jurisdiction to enter upon the question of revision, and that its order should therefore be quashed.

In my opinion, the writ of *Certiorari* should go.

ANDREWS, and JOHNSON, JJ., concurred.

A. E. R. J.

Appeal. 1900. July 28, 30.

The Commissioner of Valuation appealed (1).

(1) In the Court of Appeal before LORD ASHBOURNE, C., and FITZGIBBON, and HOLMES, L.JJ.

The Solicitor-General (*Wright, Q.C.*), and *Ronan, Q.C.* (with them *Vesey Fitzgerald*), for the appellant:—

The remedy by *certiorari* is inapplicable, as the writ is only granted in the case of judicial acts. This was a ministerial, and not a judicial, act: Burn's Justice of the Peace, 608; *Reg.* v. *Overseers of Salford* (1); *Reg.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (2); *Royal Aquarium and Summer Garden Society* v. *Parkinson* (3); *Reg.* v. *Court of Watermen and Lightermen of the Thames* (4); *Reg.* v. *London County Council* (5); *Re Dawdy* (6); *Scott* v. *Avery* (7).

Even if the act of the Commissioner was judicial, the Kildare County Council are estopped from raising the question of jurisdiction, because they appeared before the County Court Judge, and argued the case fully without objecting to the jurisdiction: *Reg.* v. *South Holland Drainage Committee* (8). The appeal to the County Court Judge was taken on the basis that the Commissioner of Valuation had jurisdiction.

Falconer, Q.C., and *D. Kehoe*, for the Kildare County Council:

The act of the Commissioner of Valuation was a judicial act and not a ministerial act, and, consequently, *certiorari* lies to quash it. An illegal borough-rate can be quashed: *Reg.* v. *Corporation of Dublin* (9); so also jurors' lists containing the names of unqualified persons: *Reg.* v. *Justices of Armagh* (10). The valuation is essentially a judicial proceeding, involving the decision of questions of law and fact. Moreover, an appeal lies from the decision, which can only apply to a judicial act.

The judgment of the Court of Appeal was delivered by— July 30.

HOLMES, L.J.:—

The matters to be considered in this appeal possess a general importance out of proportion to the gain or loss that can accrue to the parties directly interested in its decision.

(1) 18 Q. B. 687.
(2) [1891] 1 Q. B. 378.
(3) [1892] 1 Q. B. 431.
(4) [1897] 1 Q. B. 659.
(5) 71 L. T. (N. S.) 638.
(6) 15 Q. B. D. 426, 430.
(7) 5 H. L. Cas. 811, 853.
(8) 8 A. & E. 429.
(9) 2 L. R. Ir. 371.
(10) 6 Ir. Jur. (N. S.) 212.

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The County Council of Kildare is seeking to quash by means of a writ of *certiorari* a revised valuation of the portion of the Great Southern and Western Railway line that passes through that county, upon the ground that the Commissioner of Valuation undertook the revision without due authority; and if the Council succeeds, it will, for a year or two, be able to assess the Railway Company on a valuation higher than the present actual value of the property. The Company, however, would be entitled to take immediate steps for the purpose of having the present valuation revised in due course of law; and it can hardly be doubted that the result of such revision would be to restore the valuation that is now objected to. The present litigation is not likely, therefore, to have any permanent consequences as far as the parties engaged in it are concerned; but inasmuch as it involves important questions relating to the functions of the Commissioner of Valuation and to the granting of writs of *certiorari*, it is necessary to state, with clearness and precision, the grounds of our judgment.

The authority of the Commissioner of Valuation is derived from the General Valuation Act, 1852, and some amending statutes. These enactments provide for one uniform valuation of lands and tenements in Ireland, to be used for all public and local assessments, and for the revision from time to time of such original valuation.

The revisions of valuation may be divided into two classes, one, a periodic revision, pursuant to the 34th section of the Act of 1852, and another, an annual revision, pursuant to the 4th and 5th sections of the amending Act of 1854. We are only concerned in the present appeal with the latter, which is confined to cases of alterations in the area of occupation of lands, and to such property as fisheries, railways, mines, and buildings, which are liable to frequent fluctuations in value.

Although this revision is to be carried out by the Commissioner of Valuation, he does not undertake it, *proprio motu*; he is put in action by persons interested. Every collector of rates is bound before a prescribed day to send to the Secretary of the County Council a list of the tenements and hereditaments within his district that require revision, and any ratepayer may, before

the same day, deliver to such secretary a similar list. Such lists are then left open for public inspection, and the secretary is, within a prescribed period, to make out one full and complete list of all tenements and property mentioned in the lists thus furnished to him, and to transmit the same to the Commissioner of Valuation, with the opinion of the County Council whether a revision is necessary or not. After the receipt of such list, the Commissioner of Valuation is by the 5th section of the Act of 1854 directed to cause a revision to be made of the valuation, and to appoint fit and proper persons to revise the valuation of the tenements so requiring revision. As soon as the revision is completed, the Commissioner is directed to prepare and sign a revised list, or lists, of the valuation, or of the tenements so revised, and transmit the same to the County Council by whom publication thereof is to be made.

The foregoing concise abstract of the provisions relating to the revision of the valuation will serve to introduce and explain two of the questions that have been discussed by Palles, C.B., in delivering the judgment of the Divisional Court. It is admitted that the railway line did not appear in any list furnished to the Secretary of the Kildare County Council, or in the full and complete list delivered by him to the Commissioner of Valuation. The revision of the valuation of the line, so far as county Kildare is concerned, was undertaken voluntarily by the Commissioner, and he was led to do so by the fact that the portion of the line that passes through Kerry appeared in the list, delivered by the Secretary of the Council of that county. It is said that the mode usually adopted in the valuation of a railway is to ascertain in the first place the annual value of the entire undertaking, and then to subdivide such value amongst the portions of the line that run through different counties in accordance with certain principles, which are supposed to lead to a just and equitable result. No reasonable objection can, I think, be taken to this method of valuation. Indeed it would be impossible to place an independent value upon the part of a railway that is contained in one county without some reference to the undertaking as a whole; and it is stated that the mode of valuation adopted in

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this case has been employed, without objection, in revising the valuation of some of the principal railway systems in Ireland.

The result of applying it to the Great Southern and Western line was to raise considerably the aggregate value of the railway; but while in the distribution of this amount, the valuation of the line in most counties was increased, the valuation of the Kildare portion was reduced by about £5000. Under these circumstances the Commissioner was of opinion that it was his duty to revise, in accordance with the result thus arrived at, the valuation of the line in every county through which it passes, irrespective of whether it was included in the revision lists of such county or not.

The Chief Baron in giving the judgment of the Divisional Court held upon the two sections of the Act of 1854, which I have abstracted, that the only subject-matter in respect of which the Commissioner of Valuation is entitled to exercise his judgment in the way of revision is the rateable hereditaments mentioned in the lists referred to in those sections, and that it followed that the Commissioner had no authority or jurisdiction to revise the valuation of the railway in Kildare, even although in making the valuation called for in Kerry he had ascertained that there had been a change in the value of the entire undertaking.

The contrary of this proposition has not been argued in this Court, and indeed counsel for the appellant, while not expressly admitting it, have assumed that if this objection to the revised valuation had been taken on the appeal to Quarter Sessions, it ought to have been decided in favour of the County Council. I propose to deal with the case on this assumption; and in the absence of argument on either side, we ought not to question the conclusion arrived at by the Divisional Court. At the same time, I see the possibility of these matters arising hereafter in another shape and under other conditions; and as there are some expressions in these and other sections suggesting the view that the Commissioner of Valuation, to whom lists have been delivered in the prescribed manner, can in the course of his revision go beyond the rateable hereditaments specified in such lists, I desire to keep this matter open for further consideration. It is

especially desirable to do so in the case of property like a railway extending over several counties, the valuation of which in one county can only be arrived at according to the evidence given in this case by first ascertaining the value of the whole, and by afterwards subdividing such aggregate value over its several parts.

Assuming, however, for my present purpose that the Commissioner acted without authority, and in excess of his jurisdiction in revising the valuation of the railway, the next question is whether the revised valuation signed by him can be made the subject of a writ of *certiorari*.

On this point I expressed during the argument doubts which further consideration has entirely removed. Upon reading the sections prescribing the duties of the Commissioner, I find it impossible to hold that in making or revising a valuation he is discharging a purely administrative or ministerial function. His valuation is undoubtedly a judicial act, involving the consideration and decision of questions of law and fact, with the result of imposing liability on, or affecting the rights of, members of the public; and although he does not hold a Court, nor adopt the usual course of legal procedure, he is constituted by the statute a tribunal with powers essentially judicial.

It has been held on more than one occasion that an illegal borough rate can be quashed by means of the writ of *certiorari*: *The Queen* v. *The Corporation of Dublin* (1), and I feel bound to say that there is much more room for doubt in such a case than in the case of a valuation made by the Commissioner of Valuation. Indeed the provisions of the statute itself seem to me to make the matter clear. When the valuation is made and signed, an opportunity is given to any person aggrieved thereby to have the grounds of his grievance reconsidered by the Commissioner himself; and this process is described in the Act as an appeal—a word peculiarly appropriate to judicial proceedings: and if the result of such appeal be considered unsatisfactory by the person aggrieved, a further appeal is given to the Court of Quarter Sessions.

For these reasons, I am of opinion that the revised valuation

(1) 2 L. R. Ir. 371.

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is such a document as may be the subject of a writ of *certiorari*, and upon the assumption that it was made without jurisdiction, I should be prepared to hold that it ought to be removed into the Queen's Bench Division with a view to its being quashed, were it not for a further circumstance which I think affords a conclusive answer to the application.

I have already referred to the two appeals, one to the Commissioner himself, and the other to Quarter Sessions. I have no doubt that if it was a necessary condition to the revision that the railway should appear in the lists, its non-appearance therein would have been a good ground of appeal. I am not to be understood as suggesting that the remedy by way of appeal is inconsistent with the remedy by writ of *certiorari*. I am of opinion that the two may co-exist; and in the present case, the County Council might have made this application to the Queen's Bench Division immediately after the revised valuation had been signed. But this was not done. The two appeals were taken in succession, and the peculiarity of the case is that in neither of them was this point relied on.

The provisions as to the appeal to Quarter Sessions are somewhat remarkable in one respect. The notice of appeal must state the grounds of appeal, and the Court is prohibited in express terms from considering any cause or matter of appeal other than what is so stated.

The County Council before taking the appeal was aware of the point now relied on; but by excluding it from the notice of appeal, it prevented it from being adjudicated on by the Court of Quarter Sessions. Had it been properly raised before that tribunal it might have been ruled in favour of the appellant; and if it had been decided otherwise the County Council might have called on the Court to state a case for the Queen's Bench Division, or might have sought a remedy by writ of *certiorari*. Instead of this the County Council took the chance of increasing the valuation beyond what it had stood at originally, and it was only when it failed in this that it raised the objection to revision founded on want of jurisdiction.

I concur with the Chief Baron in holding that where the right of an individual is prejudiced by an adjudication of an inferior

tribunal, the writ of *certiorari* is not a matter of discretion but of right; but I also agree with him when he says that the right to question such an adjudication can be lost by the conduct of the party. I cannot conceive a stronger case of estoppel by conduct than the present. The appeal that was taken, so far from raising the point now relied on, asked for relief that could only be granted on the assumption that there was jurisdiction to revise the valuation; and the appellant now seeks to quash the order of the Court whose assistance he invoked, because, although it was to a certain extent in his favour, it was not so favourable as he expected, or desired. Upon this ground I am of opinion that the appeal ought to be allowed, and the order for the issue of the writ of *certiorari* discharged.

I desire to add a word upon a matter which, if not referred to, may lead to confusion or further litigation. I believe that we are all of opinion that unless and until a revised valuation is got rid of, either by means of an appeal or by writ of *certiorari*, the rate must be struck according to such valuation, and that, therefore, in this case, the County Council is bound to make the assessment upon the valuation as settled by the order of Quarter Sessions.

Solicitor for the Commissioner of Valuation: *Sir P. Coll.*
Solicitors for the Great Southern and Western Railway Company: *Sir Croker Barrington & Co.*
Solicitors for the Kildare County Council: *White & White.*

R. D. M.

Q. B. Div. Probate. 1900.

MURRAY *v.* CHAMPERNOWNE (1).

(1899. No. 43.)

Oct. 30, 31. Nov. 27.

Probate—Power of appointment—Will made in execution of power—Foreign domicil—Limited grant.

By marriage settlement, made in 1853, real estate in Ireland and certain moneys were vested in trustees by the intended husband upon trust to sell the real estate, and to hold the proceeds of sale and the moneys upon trust (in the events, which happened, of there being no child of the marriage, and of the husband dying in the lifetime of his wife), for such person or persons, for such estates or interests, and in such manner as he should by deed, or by his last will and testament, in writing, appoint.

The husband died in 1865, having made his will in Scotland in 1862, by which he gave all the rest of his property to his wife for life, and appointed her residuary legatee.

In 1866 probate of the will, in common form, was granted to A, who had been appointed executor and trustee. In 1897 the wife died, having made a will appointing B executor and residuary legatee.

The husband was a domiciled Scotchman. His will was duly executed according to the Wills Act, 1837, but invalid according to Scotch law. The real estate remained unsold.

An action having been brought to revoke the probate of the will of the husband, the Court *held*:—

1. That the real estate was, notwithstanding the trust for conversion, to be regarded as land; and that, the will being valid according to the law of England, the residuary gift was a good appointment of the beneficial interest in the lands to the wife.

2. That the residuary gift was also a good appointment of the trust moneys, inasmuch as the intention of the settlement was that the trust funds were to be disposed of by a will made according to the law of England.

3. That the probate in common form should be revoked, and liberty given to B to apply for a grant limited to the real estate and trust moneys, the subject-matter of the power of appointment.

TRIAL OF ACTION.

This action was brought to revoke the probate in common form of the will of Alexander Murray.

(1) Before ANDREWS, J.

The facts of the case and the authorities cited are sufficiently stated in the judgment.

Matheson, Q.C., and *Oulton*, for the plaintiff.

Wakely, Q.C., and *Corvan*, for the defendants.

ANDREWS, J.;— Nov. 27.

This was an action tried by me without a jury in the present sittings, to revoke the probate which was granted in common form on the 29th March, 1866, of the will of Alexander Murray, dated the 17th November, 1862 (which I shall hereafter refer to as the will of 1862), and the defendants by their counterclaim asked for probate of this will in solemn form. It was established, without controversy, that Alexander Murray when he executed the will of 1862 in Scotland, and up to the time of his death in 1865, was a domiciled Scotchman, and that this will was invalid according to Scotch law. The general probate which has been granted must, therefore, be revoked, and the question then arises whether, inasmuch as the will of 1862 was proved to have been duly executed in accordance with the provisions of the Wills Act, 1837 (1 Vict. c. 26), there should be a decree for a limited grant, and, if so, what the grant should be.

I was informed at the trial that an action is pending in the Chancery Division to declare who is entitled to the lands of Rathsheagh in the county of Westmeath; and it is necessary for the decision of this question to determine whether the will of 1862 is valid as a disposition of these lands or the proceeds of the sale thereof. The action tried by me was both in form and substance a probate action; and although since the Judicature Act I would have jurisdiction, as a Judge of the High Court, to determine in an action, properly framed for the purpose, the question of the right to the lands of Rathsheagh, as well as the question whether there should be a decree for a limited grant, and, if so, what that grant should be, in relation to the will of 1862, I think my proper course, under the circumstances, is to limit my decision in this action to the latter question, although in determining it

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Andrews, J.

I may be obliged to consider matters which materially relate to the former question also.

Two deeds, each dated the 17th August, 1853, were executed in contemplation of the marriage of Alexander Murray with his late wife Eugenia Grace Murray, then Eugenia Grace Curtis. By one of these deeds he conveyed the lands of Rathsheagh to trustees upon trust after the marriage, at the request in writing of himself and his wife, and of the survivor of them, and after the death of the survivor, at the discretion of the trustees absolutely, to sell the said lands, and hold the net purchase-money, and the rents and profits in the meantime until the sale, upon the trusts declared by the deed of even date. By the other of these deeds, being the deed of even date so referred to, it was declared that the net moneys to arise from the sale of the said lands and two sums of £2000 each (which Alexander Murray had vested in the trustees) thereinafter referred to as "the said Murray trust monies," should, in case there should be no child of the marriage (which happened), and Alexander Murray should die in his wife's lifetime (which he did), be held "in trust for such person or persons for such estates or interests and in such manner in all respects" as Alexander Murray by deed "or by his last will and testament in writing shall appoint"; and it was declared that until the said lands should be sold the trustees should pay the net rents and profits thereof to the person or persons, to and for the intents and purposes, and in the manner, to whom, and for and in which, the annual income of the investments of the said Murray trust moneys would be payable or applicable if the said lands had then been sold, and the net moneys arising from the sale invested. These lands of Rathsheagh still remain unsold, and, apparently, notwithstanding the trust for sale, there may be an election to take them as land. By a will dated the 7th May, 1860, admitted (as I understand) to have been duly executed in accordance with the provisions of the Wills Act, 1837, and also to be valid according to Scotch law, the testator disposed of his "Irish property" in terms which it is assumed, and I think rightly, would be sufficient to operate as an execution of his general power of appointment under his marriage settlement over the lands of Rathsheagh, or the proceeds of the sale thereof. By the will of 1862 Alexander

Murray purported to exercise a general power of appointment over the property given to him by the will of William Percy Lea, and he then proceeded as follows:—"And as to all the rest, residue, and remainder of my property of what nature or kind soever or wheresoever not otherwise disposed of by this my will I give, devise, and bequeath the same to my dearest wife Eugenia Grace Murray for her life, whom I hereby appoint my residuary legatee, and I nominate and appoint my brother Thomas H. Lumsden Murray executor and trustee of this my will, and hereby revoking all former wills made by me I declare this to be my last will and testament." As I have already mentioned, this will was proved at the trial to have been duly executed in accordance with the provisions of the Wills Act, 1837, but to be invalid according to Scotch law. Eugenia Grace Murray died on the 1st April, 1897, having by her will dated the 30th November, 1894 (which has been proved in England and resealed in Ireland), bequeathed the residue of her property real and personal to the defendant Philip Charles Knightley Wolfe Murray, whom she appointed an executor, and to whom alone the probate was granted.

Now I have come to the conclusion, for the purposes of my decree in this action, that the will of 1862, having been duly executed according to Irish law, was, under the circumstances of this case, capable of operating as an execution of Alexander Murray's general power of appointment under his marriage settlement, and that the residuary gift in that will was capable of operating, and I think did operate, even without the revocatory clause, to revoke the appointment in the will of 1860, and to vest in Eugenia Grace Murray absolutely all the property over which Alexander Murray had such power of appointment. See, amongst other cases, *Hughes* v. *Pritchard* (1); *Hopewell* v. *Ackland* (2); *Scott* v. *Alberry* (3); *Day* v. *Daveron* (4); and I shall declare and decree that Philip Charles Knightley Wolfe Murray is at liberty to apply in the Principal Registry for a grant to him of letters of administration with the will of 1862 annexed, limited to such property as Alexander Murray had such power of appointment over, in so far as he did by the will of 1862 appoint

(1) 6 Ch. D. 24.
(2) Salk. 239.
(3) 8 Vin. Ab. 229, Pl. 14.
(4) 12 Sim. 200.

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the same, and in so far as the same so appointed passed under the will of Eugenia Grace Murray.

It is settled law that the formalities required for the disposal by will, and the validity of a will, of immovable property in Ireland, are governed by the testamentary law of Ireland (the *lex situs*) which, I think, must also apply to a testamentary appointment under a power, and, in my opinion, if the lands of Rathsheagh are to be regarded as immovable property, the will of 1862 is a valid testamentary appointment of the beneficial interest in those lands, which, in case of a subsequent sale under the trusts of 1853, would have entitled the appointee to the proceeds of the sale thereof. It was argued, however, that the lands of Rathsheagh were equitably converted into money by the first deed of 1853, hereinbefore referred to, and must, therefore, though unsold, be regarded as movable property which the will of 1862 was invalid to pass. The research of counsel failed to find any decided case which would be an authority for this proposition, and I am not aware of any such case. Mr. Dicey (Conflict of Laws, page 520, note 2) seems to be of opinion that the succession to the property would, in such a case, be governed by the *lex situs*, and that is my opinion. The lands of Rathsheagh, notwithstanding the doctrine of equitable conversion, are still lands in fact, and may never be sold under the trusts of 1853. If the will of 1862 was sufficient to pass the beneficial interest in them as land, which, in my opinion, it was, the appointee's title is not, in my opinion, destroyed by the fact that the will is invalid to pass movable property of the testator, which the lands have never, in fact, been converted into, or, more accurately speaking, become represented by. In *Freke* v. *Lord Carbery* (1), Lord Selborne, in giving judgment, said (page 466): "Domicil is allowed in this country to have the same influence as in other countries in determining the succession of movable estate, but the maxim of the law of the civilized world is *mobilia sequuntur personam*, and is founded on the nature of things. But land, whether held for a chattel interest, or held for a freehold interest, is in nature, as a matter of fact, immovable, and not movable. The doctrine is inapplicable to it."

(1) L. R. 16 Eq. 461.

If, as the law unquestionably is, an owner of land in Ireland, no matter what his domicil may be, can only devise it by a will made in accordance with the law of Ireland, I am unable to hold that he can, if domiciled say in Scotland, enable himself to dispose of it by a Scotch will, not in accordance with the law of Ireland, by previously vesting it in a trustee for sale, the trust being unperformed. It is still immovable property, in fact, and the disposition of it is a disposition of immovable property, and not of something else, namely the money by which, if sold, it would be represented, but which before the sale does not, in fact, exist. I may also observe that the devolution of property does not determine whether it is movable or immovable.

So much for the lands of Rathsheagh; but there is another ground on which, I think, there should be a grant of administration with the will of 1862 annexed, with the limitation I have already mentioned, which includes the whole of the property comprised in "the said Murray trust monies," in so far as it passed by the will of Eugenia Grace Murray. The settlement of 1853 which created Alexander Murray's general power of appointment was either an Irish or an English deed. It is immaterial which it may be regarded as, and the conclusion I have come to, on its construction, is that the intention was to give Alexander Murray power to appoint by a will made in accordance with Irish or English law, and to be construed in accordance with such law. I find nothing in the settlement opposed to this construction. The words in the power in question are: "or by his last will and testament in writing shall appoint." In a previous part of the settlement where he is given a power of testamentary appointment to children of the marriage, the words are, "or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed in the presence of and subscribed by two witnesses shall appoint."

This certainly seems to point to a will in accordance with Irish or English law, and I do not think that the will referred to in his general power of appointment can be held to be a different kind of will. Therefore, even if the lands of Rathsheagh are to be regarded as movable property, by reason of the equitable conversion, it appears to me that there should still be

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a grant of administration with the will of 1862 annexed, limited, as I have already mentioned, because I regard the will, in so far as form is concerned, as having been executed in accordance with the terms of the power, as well as in accordance with the testamentary law of Ireland and England, and I think the testator must be taken to have intended that it should be construed in accordance with the rules of that law, which would authorise the application of the rule of construction in the 27th section of the Wills Act, 1837. This view, as it appears to me, would support the will of 1862 (construing it as I do) as a good execution of the power in relation as well to the lands of Rathsheagh (whether they are to be regarded as immovable or movable property) as to the remainder of the property which was clearly movable, comprised in "the said Murray trust monies." The following (amongst other) authorities, in addition to those I have already referred to, appear to me to warrant the conclusions I have come to for the purposes of my decree in this action: *Goods of Gentili* (1); *De Fogassieras* v. *Duport* (2); *Goods of Alexander* (3); *Goods of Hallyburton* (4); *D'Huart* v. *Harkness* (5); *Re Price, Tomlin* v. *Latter* (6); *Goods of Huber* (7); *Pouey* v. *Hordern* (8); *Goods of Gunn* (9), a decision as to the right to probate and liability to duty, *Goods of Trefond* (10); *In re Gibbes' Settlement, White* v. *Randolf* (11). I may also refer to Dicey's Conflict of Laws, as to immovables at pp. 516–520, and to execution of power by will at pp. 701–703. The will of 1862 may also be valid as an appointment under the power therein stated to have been given to Alexander Murray by the will of William Percy Lea, but, as I have not sufficient materials or evidence to determine this question in the present action, I shall, by my decree, expressly save all such rights as may exist to have a further grant of administration, with the will of 1862 annexed, to such person or persons as may be entitled thereto, limited to the property of William Percy Lea over which by his

(1) I. R. 9 Eq. 541.
(2) 11 L. R. Ir. 123.
(3) 29 L. J. (N. S.) P. & M. 93.
(4) L. R. 1 P. & M. 90.
(5) 34 Beav. 394.
(6) [1900] 1 Ch. 442, 453.
(7) [1896] P. 209.
(8) [1900] 1 Ch. 492.
(9) 9 P. D. 242.
(10) [1899] P. 247.
(11) 37 Ch. D. 148.

will he gave Alexander Murray a power of appointment, as stated in the will of 1862; I shall direct that the parties to this action do, respectively, abide their own costs of this action, and I shall reserve a general liberty to apply.

The curial part of the decree was as follows:—

"The Court doth find and declare that Alexander Murray, late a Lieutenant-Colonel of Her Majesty's 87th Regiment Royal Irish Fusiliers, was domiciled in Scotland at the time when he executed as he did in Scotland the paper writing dated the 17th day of November, 1862, purporting to be his last will, and that he continued to be so domiciled up to the time of his death on the 24th day of December, 1865, and that the said paper writing was not duly made or executed as a testamentary instrument according to the law of Scotland, and the Court doth accordingly declare and decree that the said paper writing is invalid and of no force in so far as it purports to dispose of or relates to the movable property of the said Alexander Murray, of which he was possessed at the time of his death, not, however, including such estate and interest in the lands of Rathsheagh, in the county of Westmeath in Ireland, hereinafter mentioned (which still remain unsold), or the proceeds of the sale thereof, and such other monies included in the expression "the said Murray trust monies" hereinafter referred to as he had power to appoint as hereinafter referred to, and did by the said paper writing appoint accordingly, and also not including any of the property of William Percy Lea, hereinafter mentioned, which the said Alexander Murray may have had power to appoint, and by the said paper writing may have appointed as hereinafter referred to. And the Court doth further declare and decree that the said paper writing is also invalid and of no force in so far as it purports to appoint an executor or to revoke any prior testamentary dispositions of movable property of the said Alexander Murray, not, however, including any prior testamentary appointment under either of the said powers, and saving all such rights as may exist to have administration with the said paper writing annexed granted by the proper authority in that behalf to such person or persons as may be entitled to such grant, limited to the property of William Percy Lea, deceased, late a Major in the aforesaid regiment, over which it is recited in the said paper writing that the said William Percy Lea by his will dated the 19th day of July, 1862, gave the said Alexander Murray a power of appointment as therein mentioned, which the said Alexander Murray purported to exercise by the said paper writing dated the 17th day of November, 1862, and the Court doth order and decree that the probate of the said paper writing granted

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in common form forth of the Principal Probate Registry in Dublin on the 29th day of March, 1866, to Thomas Andrew Lumsden Murray be and the same is hereby recalled and revoked. And the Court doth further find and doth declare and decree that the said paper writing dated 17th day of November, 1862, was duly executed as a will of the said Alexander Murray in accordance with the provisions in that behalf of the Statute 1st Victoria, Chapter 26, and it appearing to the Court for the purposes of this decree that the residuary gift in the said paper writing was in terms sufficient to operate as an execution of the said Alexander Murray's general power of appointment over the lands of Rathsheagh, in the county of Westmeath in Ireland, or the proceeds of the sale thereof, and other the monies referred to as and included in the expression "the said Murray trust monies" in and by the indenture of settlement dated the 17th day of August, 1853, and the endorsement thereon of even date therewith, executed respectively in contemplation of the marriage of the said Alexander Murray with his late wife Eugenia Grace Murray (then Eugenia Grace Curtis Spinster), whereby the said power of appointment was given to the said Alexander Murray in case there should be no child of the said marriage and he should die in the lifetime of his said wife (which events happened), and it also appearing to the Court for the like purposes that the said residuary gift was in terms sufficient as an appointment under the said power to entitle the said Eugenia Grace Murray to all the estate and interest in the said lands or the proceeds of the sale thereof, and other the monies so referred to as and included in the expression "the said Murray trust monies" as aforesaid, which the said Alexander Murray had power to appoint as aforesaid, the Court doth further declare and decree that the defendant Philip Charles Knightley Wolfe Murray as sole executor and residuary devisee and legatee in the will dated the 30th day of November, 1894, of the said Eugenia Grace Murray, who died on the 1st day of April, 1897, and probate of whose said will was on the 18th day of June, 1897, granted to the said Philip Charles Knightley Wolfe Murray alone forth of the Principal Probate Registry in England, and resealed in Ireland on the 1st day of December, 1898, be and he is at liberty to apply at the Principal Probate Registry in Dublin for a grant to him of letters of administration with the said paper writing dated the 17th day of November, 1862, annexed, limited to such estate and interest in the aforesaid lands of Rathsheagh or the proceeds of the sale thereof and such other monies so referred to as and included in the expression "the said Murray trust monies" as aforesaid, as the said Alexander Murray had power to appoint, in so far as he did by

the said paper writing appoint the same, and in so far as the same so appointed passed under the aforesaid will of the said Eugenia Grace Murray. And doth further order that the plaintiff and the defendants in this action do respectively abide their own costs of and in this action, and that they, and all persons interested in relation to the matters hereinbefore referred to, or any of them, do have liberty to apply to the Court as they may be advised."

Solicitors for the plaintiff: *S. Gordon & Son.*
Solicitor for the defendant: *C. P. Wilson.*

W. L.

BRENNAN, APPLICANT; THE DUBLIN UNITED TRAMWAYS COMPANY, RESPONDENTS (1).

Appeal. 1900. June 8, 14.

Master and servant—Workmen's Compensation Act, 1897, *sects.* 4, 7—*Undertaker—Work merely ancillary or incidental to the trade or business of undertaker—Practice—Appeal.*

A company, whose business was running cars for passenger traffic through the streets of Dublin on a tramway by electric power, employed a firm of contractors to erect coal hauling machinery at one of their power stations. Part of the coal hauling machinery consisted of a trolley, at which B. was engaged at work. A splinter from the head of a bolt which he was driving into the trolley struck him in the eye, and destroyed the sight of the eye. B. was employed by the firm and not by the company. At the time of the accident the firm had not handed over the coal hauling machinery to the company, and none of the company's workmen were engaged upon it:—

Held, that the erection of the coal hauling machinery in the power station was work merely ancillary to the company's trade or business, and that they were not liable to pay B. compensation under the Workmen's Compensation Act, 1897.

APPEAL from an order made by the Recorder of Dublin in an arbitration matter under the provisions of the Workmen's Compensation Act, 1897.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900.

BRENNAN *Applicant;* D. U. TRAMWAYS CO., *Respondents.*

The application for arbitration by Brennan was in the usual form. In the column where the applicant is required to set forth the "nature of employment of workman at time of accident, and whether employed under respondents or under contractors with them," the particulars stated that he was a "labourer employed under contractors with respondents—C. W. Hunt & Co. of New York." The "date and place of accident, nature of work on which workman was then engaged, and nature of accident, and cause of injury" were thus stated, "17th August, 1899; Ringsend Lower Station; driving bolt into trolley; splinter from head of bolt flew off and struck applicant in left eye." The "nature of the injury" was "the loss of left eye." The application further stated that the applicant was totally incapacitated for work, that his previous average earnings had been 30*s.* weekly, that he had received half his wages up to September, 1899, after the accident, and that he claimed as compensation 15*s.* a week from September, 1899.

The statutory notice of accident was served on the respondents on January 24, 1900.

The respondents in reply to the application for arbitration served a notice denying their liability to pay compensation under the Act on the grounds that at the time of the accident James Brennan was not immediately employed by the respondents, but was employed by C. W. Hunt & Co., contractors with the said Dublin United Tramway Company of a work which consisted of the erection of a power station for generating electricity for the said Tramway Company, and that the said C. W. Hunt & Co. were the undertakers of the said work, and not the respondents, and that the erection of the said station was not part of or process in the trade or business carried on by the said Dublin United Tramways Company, Limited, but was merely incidental thereto. The Recorder found in favour of the applicant, and awarded him compensation. The Dublin United Tramway Company appealed. There was no statement of the facts and of the question of law arising thereon in the form of a case stated by the Recorder furnished for the Court, but a judgment which had been written by the Recorder was produced. The judgment was in the following words:—"The question here is whether the case is within the 4th

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section of the Act under which the claim is made. The applicant at the time of the accident was not in the employment of the defendants but in that of their contractors, Messrs. C. W. Hunt & Co., who were then under contract constructing for the defendants part of their necessary apparatus for generating the electric power by which their trams through the city are moved, upon the defendants' premises at Ringsend. The 4th section provides that where the undertakers contract for the execution of any work which if executed by workmen immediately employed by them would make the undertakers liable to pay compensation under the Act, they, the undertakers, shall be liable to pay any compensation to any workman which would be payable by the contractor either under this Act or for personal negligence or wilful act independently of the Act, or which would be so payable if the contractor were an employer under the Act, provided, however, that the work is not merely ancillary or incidental to and no part of or process in the trade or business carried on by the undertakers. Looking at this section apart from authority, it has appeared to me to be passed in relation to the well-known defence both at common law and under the Employers' Liability Act of undertakers that an accident was caused by the negligence, &c., of an independent contractor, which often left an injury without practical remedy when the contractor was a man of straw—and unable to give compensation—a case which frequently happened. The recent case of *Pearce* v. *London & South-Western Railway Company* (1), I think, confirms this view, as the Court of Appeal considered that the section would apply if they had not held that the contract work in that case was only ancillary and not part of the business or undertaking of a railway company; and if they did mean this and not merely that the reparation of the station in that case was ancillary, I think the Court could scarcely have had before their minds the fact that the stations are always shown upon the Parliamentary plans as part of the undertaking, and for the site of which the company obtains compulsory powers of purchase, that they are part of the essential accommodation which they offer both to landowners and the public in return for the powers and

(1) [1900] 2 Q. B. 100.

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monopoly they receive from Parliament, and which for the purposes of traffic and the collection of tolls and issuing of tickets and way-bills are as essential to the work of the railway as the rails and the engines themselves. I would have thought that the distinction would have been between such ancillary accommodation as terminal hotels such as are largely carried on by the London & North Western, Midland and other Railway Companies; and, on the other hand, booking offices, stores, engines, and carriage sheds which are essentially necessary for the business of a railway company both in their own and the public interests. I notice this, however, only to emphasize that this case shows how great caution must be observed in deciding what work is essential and what only ancillary within the proviso of the 4th section.

"The contract work here was for the construction of a very elaborate apparatus by which the fires necessary for the steam engines by which the electric power is produced are supplied with coals. By this the coals are carried up from the quays into a large receptacle situated vertically above the fire furnaces, and from this they are let down through a sort of shaft, but in falling they are intercepted by a weighing apparatus which moves on rails from one of the furnaces to another, stopping under each coal receptacle while the coals are lowered and weighed. It was whilst engaged at one of their movable machines, called 'trolleys,' when it was in the immediate vicinity of the coal shaft, then at work, the applicant lost his eye without any misconduct on his part. I cannot but think that this apparatus being an essential part of that by which the electric power which is the essential feature of the defendants' undertaking is generated ought to be considered not as ancillary to but part—and an essential part—of the trade or business carried on by the defendants in pursuance of their private Act of Parliament and their Articles of Association. If I am right in this, the defendants if they were themselves executing the work by workmen immediately employed by themselves would be liable to pay compensation within the terms of the 4th section, and I am therefore of opinion that the 4th section applies to this case. The place was indubitably a factory under the 7th section of the Act of which the defendants were occupiers within the definition of 'undertakers' in the same section.

"I award compensation at the rate of 15*s.* per week from the date of the last payment to the applicant up to the present, allowing thereout 25*s.* earned by the applicant for work done during the Queen's visit, and also 30*s.* as against the two weeks immediately after the accident which are excluded from the compensations allowed by the Act; and I award continuing compensation of 5*s.* per week from the present, subject to variation under the provisions of the statute.

"Mr. T. J. Smyth strongly pressed the fact that at the time of the accident the apparatus had not been handed over by the contractors to the defendants, though it was at the time actually generating electric power by which cars through the city were actually moved, and that none of the defendants' workmen were then engaged in working it; but this, I think, is only another way of saying that the 4th section does not apply."

The respondents appealed from the decision of the Recorder.

Gordon, Q.C., and *T. J. Smyth*, for the appellants:—

It is conceded that Brennan was in the employment of the firm of contractors, and not in the employment of the appellants. The accident occurred on August 17, 1899; no part of the machinery on which the injured man was employed was handed over to the Tramway Company until September 3, 1899. The Tramway Company were not the "undertakers" of the work on which Brennan was injured; the erection of the machinery in their power station is not part of their business; they are a carrying Company, not a firm of engineers. C. W. Hunt & Co. were the "undertakers" here. Even if the appellants were the "undertakers" yet the final clause of section 4 of the Act protects them from liability. The erection by C. W. Hunt & Co. of this coal-hauling machinery was merely ancillary or incidental to, and was no part of or process in the trade or business of the Tramway Company: *Pearce* v. *London & South-Western Railway Company* (1);

(1) [1900] 2 Q. B. 100; 16 T. L. R. 336.

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Mason v. *A. R. Dean* (1); *Cass* v. *Butler* (2); *Cooper* v. *Davenport* (3); *Percival* v. *Garner* (4).

T. Sullivan, for the applicant:—

The Recorder finds that the place where the accident happened was a "factory" of which the Tramway Company were the occupiers; therefore under the definitions in section 7 they were "undertakers." The memorandum of association of the Tramway Company shows that one of the objects of the Company was to make and fit out power stations. The apparatus in the construction of which Brennan was injured is an essential part of the machinery by which the motive power of the Company's cars is provided: the erection of this apparatus cannot be said to be merely ancillary or incidental to the Company's trade or business: without it their business could not be carried on.

Cur. adv. vult.

June 14.

LORD ASHBOURNE, C.:—

In this case we are asked to review the decision of the Recorder of Dublin, who awarded compensation under the Workmen's Compensation Act, 1897, to be paid by the appellants to the respondent, for injuries received by him while engaged in fitting up a power station which a person trading as C. W. Hunt & Co. had contracted to erect for the Tramway Company. The applicant was employed by Hunt: he was one of Hunt's workmen: he received the injury while he was working for Hunt. However, he has made his claim for compensation not against Hunt, but against the Tramway Company.

When Brennan served his notice of particulars on the Tramway Company seeking compensation for his accident they replied by a notice which was in these terms:—"Take notice that the respondents deny their liability to pay compensation to James Brennan, and the grounds on which they deny their liability are, that at the time of the accident the said James Brennan was not immediately employed by the respondents, but was employed by C. W. Hunt

(1) 16 T. L. R. 212.
(2) 16 T. L. R. 227.
(3) 16 T. L. R. 266.
(4) 16 T. L. R. 396.

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& Co., a contractor with the said Dublin United Tramways Company, for a work which consisted in the erection of a power station for generating electricity for the said Tramway Company, and that the said C. W. Hunt & Co. were the undertakers of the said work, and not the respondents, and the erection of the said station was not part of or process in the trade or business carried on by the said Dublin United Tramway Company, but was merely incidental thereto." Thus the ground of defence taken by the Tramway Company was not that they disputed the injury, but that the compensation was sought from the wrong persons.

The only way in which the Tramway Company could be held liable for an injury to a workman in the employment of a contractor employed by them, would be by attributing to them the liability imposed on "undertakers" in the 4th section of the Act (60 & 61 Vict. c. 37): but it is expressly provided that "this section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in the trade or business carried on by such undertakers respectively." The liability of the defendants therefore turns upon the question whether the work upon which the plaintiff was engaged when he received the injury, was ancillary or incidental to the business carried on by the Tramway Company. The learned Recorder states that he arrived at the conclusion that the apparatus at which the applicant was engaged, "being an essential part of that by which the electric power, which is the essential feature of the defendants' undertaking is generated, ought to be considered not as ancillary to, but part—and an essential part—of the trade or business carried on by the defendants." I am unable to arrive at this conclusion. I think the erection of this power station was merely ancillary or incidental to the business carried on by the Tramway Company, and was not part of that business. I am therefore of opinion that the decision of the Recorder was incorrect and must be reversed.

FITZ GIBBON, L.J.:—

Upon such questions as are raised by the Workmen's Compensation Act, it is eminently necessary for the satisfactory determi-

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nation of the law, that the facts should be stated authoritatively, and with precision. Here we are obliged to gather them from a judgment which lacks definiteness in every respect, and we have no direct statement of the facts or of the evidence. Any difficulty which presents itself as to the law appears to me to arise entirely from the vagueness with which the facts are presented, but upon what I find in the judgment, and as the *onus* of proof lies upon the plaintiff, the conclusion seems to me to be clear.

The object of the Act is to make employers liable to compensate their own servants for injuries sustained in the course of their employment. The plaintiff was not employed by the defendants; he was employed by other people, viz. by Hunt & Co., whose liability to him is assumed, and who are stated to have given him some compensation for the injury which he sustained. He sustained that injury while doing work which Hunt & Co. had contracted to perform for the defendants: the profit of that work went to Hunt & Co. and not to the defendants; the defendants had no privity with the plaintiff, they owed him no duty as employers. If liable at all to the plaintiff in this proceeding, the defendants must be liable under some special provision of the statute, and section 4 is the only provision to which we have been referred as imposing such a liability. Though their articles empower the defendants to do many things, section 4 deals only with "trade or business *carried on by the undertakers.*" The only business which the defendants appear to have actually carried on was that of a carrying company, earning profits by carrying traffic, goods and passengers, by power. Desiring to extend their electric power, they contracted with Hunt & Co. for the erection of a machine for a fixed price, to be put up by the servants of Hunt & Co., and when completed and in working order to be handed over by Hunt & Co. as its makers, to the defendants as its purchasers. While putting it up, before it was finished, while it was still in the hands of Hunt & Co., before it was in any sense either the property of the defendants, or under their control, or working for them, the plaintiff, a paid servant of its constructors, was hurt or hurt himself, in the course of his employment. Even if it had been finished, and at work, what would have been the relation of the machine upon which the plaintiff was working to

the trade or business of the defendants? It was a machine to carry coals to the furnace which fed the fire, which raised the steam, which drove the engine, which worked the dynamo, which generated the electricity, which moved the cars, which carried the traffic, which was the business of the defendant Company. Unless the Workmen's Compensation Act is like "the House that Jack built," the work of this stoking machine was not part of the defendants' business; it was at best ancillary to it. Even if the working of the machine might have been a "part of, or process in," the business of the defendants, its construction plainly was not, and was "merely ancillary or incidental," and that remotely, to it. Therefore, under section 4 the defendants cannot be held liable to the plaintiff.

I cannot put my judgment on any narrow ground. The contract between Hunt & Co. and the defendant in my opinion constituted Hunt & Co. the "undertakers," within the meaning of the statute, of the construction of the stoking machine. I am willing to assume that the engine was being constructed in a "factory" belonging to and occupied by the defendants. I hold that the owners and occupiers of factories may, like other people, contract with outside "undertakers" for the construction, in their factories, of works machines or other things, to be delivered to them when completed, without rendering themselves liable, under the Compensation Act, 1897, to the workmen employed by the contractors, for injuries received in the execution and before the completion of the contract works. Whether a particular work is merely ancillary, or is part of or process in a particular business, cannot, in my opinion, depend on whether it is finished or not, and I therefore cannot see my way to rest my decision on the fact that the stoking machine was incomplete. My reasons must equally apply to the generating machines and to the stoking machine, so long as they were worked by the "undertakers" and not by the defendants. Of course I do not refer to injuries received by contractors' servants otherwise than in the course of their employment upon the contract works, such for instance as injuries caused by other machinery, or by the acts of persons engaged in carrying on the business of the occupiers of the factory concurrently with the construction of the work upon which

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the injured person may be engaged at the time. Such cases possibly would have to be dealt with under the ordinary law, but the facts here negative this state of circumstances. The only statement in the judgment of the Recorder which brings the business of the defendants into this transaction at all, is the statement that, when the plaintiff was hurt, electricity was being generated in the power house where he was hurt, which was being transmitted to cars which were carrying traffic of the defendants. But the machines which generated that electricity were at the time still untaken over from the makers by the defendants. No workmen of the defendants were on the premises, and the generating machines were running some sort of trial trips under the control of their makers, who were not the defendants, and who were still engaged in completing independent contracts with the defendants for the construction of the machines, which, though generating electricity, were still in the hands of those who had undertaken their construction; the machine at which the plaintiff was engaged was itself unfinished, and was not yet in working order. Even if it had been finished and at work, I should have held that such stoking as it was doing was merely ancillary and incidental to, and was not part of or process in, the trade or business of the defendants, and, therefore, that if the stoking was done by an independent person, the defendants would not be liable to compensate his servants under section 4. Whenever the defendants took the machine over and began to work it, they would at once become the employers of the workers, and the working would become part of and process in the trade or business carried on by them. But when the plaintiff was hurt it had not reached that stage, and the plaintiff stood in no relation to the defendants which could make them liable to him, either under the general provisions of the Act, or under the special provision of section 4, or under the ordinary law. The proper function of section 4 seems to me to be to provide that when any work within the Act has been undertaken as a whole by any person for a third party, and when the undertaker provides for the performance of part of his undertaking by a sub-contract—or under-letting as it were—the primary contractor or principal undertaker shall be answerable to the workmen of the sub-contractor engaged upon his undertaking.

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But here the undertakers were Hunt & Co., the defendants were the third party, and there was no sub-contract or sub-letting to which section 4 could apply.

In my opinion, the action against the defendants, the Tramway Company, by the plaintiff is wholly unsustainable, and I may add that *Pearce's Case* (1) seems to me to rule the same point.

WALKER, L.J. :—

I concur. I rest my decision upon the fact that the machine, at which the plaintiff was working when injured, was being constructed under a contract, and had not been delivered up to the Tramway Company at the time when the accident happened. The embarrassment I feel in the case is in ascertaining what the case stated by the Recorder means. Does it mean—as it appears from some of the expressions used to mean—that the machine had been completed, was actually delivered up to, and was being worked by the Company? Or does it mean that the machine was still in process of construction when the injury occurred? Upon the whole case, I think the latter is the true construction.

If the machine had been delivered up to and was being worked by the defendants, I am of opinion that they would have been liable. But it has been decided in *Pearce* v. *London & South-Western Railway Co.* (1), that the reconstruction of a railway station was no part of the main business of a Railway Company, but merely ancillary thereto, and that, therefore, the Railway Company were not responsible for an injury done to a workman employed under a contractor who had undertaken the reconstruction of the station. That case shows that, within the meaning of section 4 of the Act, the work on which Brennan was engaged was ancillary merely to the business of the Tramway Company, so long as the construction of the machine was in progress. Therefore the case does not come within the class of cases where "undertakers" are liable to pay compensation to workmen employed by sub-contractors.

(1) [1900] 2 Q. B. 100; 16 *Times* Rep. 336.

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HOLMES, L.J.:—

An appeal under the Workmen's Compensation Act, 1897, is confined to an appeal upon a question of law. There are other statutes giving a similar right of appeal; and the result of our experience is that the most convenient method of submitting such an appeal to the Court is in the form of a case, formulating with precision the legal questions to be decided, and containing an orderly and categorical statement of the facts or inferences of fact found or drawn by the tribunal appealed from, and necessary for the determination of such legal questions.

In the present instance we have not the advantage to be derived from a case of this kind. The only document sent forward by the Recorder is a copy of his written judgment, in which the conclusion arrived at is supported by arguments and comments upon the provisions of the statute and upon a previous decision, while the facts and the precise questions of law arising thereon are only incidentally referred to.

From the materials before me, I am led to assume that two questions of law arose, or might have arisen, at the hearing before the Recorder: 1, Whether the Tramway Company were undertakers within the meaning of the 4th section of the Act, and, 2, whether the contract with Hunt & Co. was for the execution by the latter of a work that was merely ancillary or incidental to the trade or business carried on by the Tramway Company. The first of these is disposed of, as far as this Court is concerned, by the following statement in the Recorder's judgment:—"The place was indubitably a factory under the 7th section of the Act, of which the defendants were occupiers." I am far from thinking that this may not have been an inference of law to be drawn from certain facts, and that the case might not have been so stated as to have made this a legal question for our determination. But if this be so, there are no materials before this Court upon which it can be decided; and I am obliged to hold, as a necessary corollary, from the statement I have quoted, that the Tramway Company were undertakers within the meaning of the 4th section.

Before dealing with the second question, I desire to set out the facts relevant thereto, as I gather them from the Recorder's

judgment, and the memorandum of association, and the contract referred to therein.

The Tramway Company was incorporated for the purpose, amongst other things, of propelling tramcars by electric power; and I am prepared to admit for the purposes of this judgment, that the generation and storing of electricity was part of or a process in its trade or business. In the year 1897 the Tramway Company entered into a contract with Hunt & Co., for the construction of a very elaborate apparatus by which the fires necessary for the steam engines by which the electric power is produced, are supplied with coals. Brennan was employed by Hunt & Co. to assist in carrying out this contract, and he met with the accident while he was so employed and before the apparatus had been handed over to the Tramway Company, but while there was being generated electric power by which cars through the city were actually moved.

This last statement must be taken in connection with the further fact, that none of the Tramway Company's workmen were then engaged in working the apparatus. This can only mean that Hunt & Co. were still carrying out their contract, and that the generation of the electricity and the moving of the cars referred to were merely for the experimental purposes of the contractors.

Upon the basis of these facts, I approach the second question of law. It is clear that within the meaning of the 2nd section, which contains the leading principle of the statute, Hunt & Co. and Brennan stand in the relation of employers and workmen, and the former would be liable to pay the latter compensation for any personal injury by accident arising out of and in the course of the employment, save as in the section is excepted.

If the Tramway Company is liable to pay him compensation, it must be under some provision, giving the workman a right thereto, against some person other than his employer; and the only such provision is found in the 4th section.

I have already said, that I am bound to hold that the Tramway Company are undertakers within the meaning of this section; and the first portion of it, if unqualified, would, on this assumption, give Brennan the right claimed by him. But the

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section is not to apply to any contract for the execution by or under the contractor of any work which is merely ancillary or incidental to, and is no part of or process in the trade or business carried on by the undertakers.

I have already stated, perhaps in wider terms than the facts justify what I conceive to be the trade and occupation of the Tramway Company, and, for the purposes of this case, I have included therein the generation of electricity. But how is it possible to extend its trade and occupation to the erection or construction of mechanical apparatus? Surely, if anything is ancillary to the trade and occupation as distinguished from being a part thereof or process therein, it is the erection of machinery.

A gas company's trade is to manufacture and sell gas, not to construct retorts. Companies for the sale of drapery and furniture generally carry on, as part of their trade, the manufacture of the furniture, but it is not part of their business, or a process therein, to build houses in which such business is to be carried on.

The fallacy in the argument on behalf of the workman, and in the Recorder's judgment, is to assume that what the incorporated company is authorised to do by statute or its memorandum of association is part of its trade and business.

A private individual, carrying on the business of a cabinet-maker, may employ a portion of his capital in building a workshop without a contractor and under his personal superintendence. In such case he would be liable to pay compensation for an accident to any person employed by him in the work; but he may, if he pleases, employ a contractor to erect the building, in which case the 4th section would not apply. The object of conferring upon incorporated companies extensive powers by the instrument of incorporation is to place them, to a certain extent, in the position of private individuals and to prevent questions of *ultra vires* arising; but these powers do not show what is their business or occupation.

The Recorder in criticising *Pearce* v. *The London and South-Western Railway Company* (1), refers to the fact that the position of railway stations is always indicated on the parliamentary

(1) [1900] 2 Q. B. 100.

plans. This is so, and so also are the lands which the Company is authorised to buy, indicated thereon. But this does not make the occupation of the Company that of land purchasers or station builders. These matters are ancillary to their occupation.

Accordingly, I hold that the appeal ought to allowed.

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Solicitor for the applicant: *James Brady.*

Solicitor for the respondents: *Gerald Byrne.*

G. Y. D.

THE REPRESENTATIVE CHURCH BODY *v.* COUNTY COUNCIL OF DUBLIN AND THE COUNCIL OF THE COUNTY BOROUGH OF DUBLIN.

Kenny, J. 1900.

June 16, 19,

Appeal.

Nov 23, 27.

Local Government—Compensation for malicious injury—Local Government (Ireland) Act (61 & 62 *Vict. c.* 37 *ss.* 5, 21)—*County Borough of Dublin—Grand Jury Act*, 1836 (6 & 7 *Wm.* 4. *c.* 116)—7 *Wm.* 4 & 1 *Vict. c.* 2—*Injuries resulting from riotous and tumultuous assemblies*—4 & 5 *Vict. c.* 10—11 & 12 *Vict. c.* 69—16 & 17 *Vict. c.* 38—57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894) *sect.* 515—*Malicious injury done without riot or tumult—Jurisdiction.*

Section 5 of the Local Government (Ireland) Act, 1898, establishes a single code applicable to the whole of Ireland regulating the right to compensation for criminal injuries, and entrusts the administration of this code to the County Court.

Therefore the Recorder of Dublin has jurisdiction to award compensation for any malicious injury falling within the definition of criminal injury as extended by that section, notwithstanding that there is no express repeal of the previous legislation by which compensation could be awarded for malicious injuries done in the city of Dublin only in cases where such injuries (not being burnings, etc.) were accompanied by riot or tumult.

APPEAL by the Council of the County Borough of Dublin from the decision of the Recorder of Galway (sitting for the Recorder of Dublin), awarding £8 compensation, payable in equal shares by the Council of the County of Dublin, and the Council of the County

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Borough of Dublin, to the Representative Church Body, for the malicious destruction of a brass cross in St. Bartholomew's Church, situated in the County of Dublin, but "on the verge or within one mile of the boundary" of the City of Dublin (sect. 140 of 6 & 7 Wm. 4, c. 116).

The appeal was taken on two grounds: (*a*) that there was no evidence of malice; (*b*) that there was no jurisdiction to award compensation against the Council of the County Borough of Dublin, as the injury was admittedly done without riot or tumult.

The appeal came before Mr. Justice Kenny, and, on the evidence, he found, as a fact, that the destruction of the cross was malicious, that the damage exceeded five pounds, but that it was not done by persons unlawfully, riotously, or tumultuously assembled.

J. P. Brett, for the applicants:—

Sub-section (1) of section 5 of the Local Government Act, 1898, transfers to the County Court the business of any presentment sessions in relation to compensation for criminal injuries: sub-section (2) (*e*) of section 21 enacts that the provisions of the Act relating to criminal injuries shall apply, although the business had formerly been vested in the council of a borough. There is, therefore, one tribunal all over Ireland to award compensation in such cases. Further, there is one single code to be administered: for there is given to every County Court the jurisdiction formerly possessed by the Grand Jury to award compensation for criminal injuries under the 6 & 7 Wm. 4, c. 116, ss. 106, 135 (so far as unrepealed), 137, 139 (so far as unrepealed), and 140; 11 & 12 Vict. c. 69; 16 & 17 Vict. c. 38, and 57 & 58 Vict. c. 60, and the jurisdiction is, at the same time, extended to include cases of malicious destruction of any kind of property, provided the damage exceeds £5: *Mairs* v. *Council of County Borough of Belfast* (1). Sub-section (9) of section 5 expressly provides that the enactments above-mentioned which are set out in Part One of the First Schedule to the Act shall extend to the

(1) [1901] 2 I. R. 1.

whole of Ireland, so far as they do not already so extend. There is, therefore, jurisdiction now to award compensation in cases like the present, though the injury was not done by a riotous or tumultuous assembly.

The plain words of the Act cannot be affected by the inclusion of the 7 Wm. 4 and 1 Vict. c. 2 in the Adaptation of Enactments Order of the 30th January, 1899. That Order is framed under the power conferred by section 105 of the Local Government Act, which enables adaptations of statutes to be made "for carrying into effect this Act": there is no power to adopt a provision which would be in conflict with the express provisions of the Act. If the provisions of the Order are not consistent with sections 5 and 21 of the Act, they should be disregarded: *The Queen* v. *Pharmaceutical Society* (1).

P. A. O'C. White, for the Council of the County Borough of Dublin:—

The 7 Wm. 4 & 1 Vict. c. 2, sect. 2, enacts that the provisions of the Grand Jury Act, 1836 (except sections 61 and 167 thereof) are not to apply to the city of Dublin: hence it happens that the jurisdiction of the Corporation of Dublin (granted by 12 & 13 Vict. c. 97), to award compensation for malicious injuries, was more limited than that of the Grand Juries of the various counties, being restricted to the subjects of compensation enumerated in 4 & 5 Vict. c. 10, 11 & 12 Vict. c. 69, 16 & 17 Vict. c. 38, and 57 & 58 Vict. c. 60, sect. 515. The 7 Wm. 4 & 1 Vict. c. 2 has not been repealed; its provisions are actually adapted by the Adaptation of Enactments Order of the 30th January, 1899. Hence in the city of Dublin the only jurisdiction which the Recorder has, in such matters, is what is transferred to him from the Corporation, *i. e.* cases where property has been burnt, or where there has been a riotous or tumultuous assembly.

No doubt he is given jurisdiction to award compensation, but it is only in cases authorised by the Acts mentioned in Part One of the First Schedule, and "any enactment applying or amending them." True, the Grand Jury Act of 1836 is mentioned in the

(1) [1899] 2 I. R. 132.

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schedule, but by the 7 Wm. 4 & 1 Vict. c. 2, it is amended so as not to apply in Dublin, and, therefore, the Recorder of Dublin has no jurisdiction to award compensation for the matters therein specified.

KENNY, J.:—

The first question for consideration in this case is whether the removal of the brass cross from its base is under the circumstances to be regarded as "malicious." [His Lordship having stated the facts, held that the destruction of the cross was malicious, that it was broken without riotous or tumultuous assembly, and that the damage done was £8.]

But the Corporation have raised a much more serious point than that which I have been discussing. They contend that there is no jurisdiction to award compensation in a case such as this, that up to the passing of the Local Government (Ireland) Act, 1898, the Corporation had no power to give compensation in circumstances similar to the present, and that the Local Government Act, according to its true construction, has not conferred on the Recorder any wider jurisdiction than had previously existed. I am informed that if the latter be extended to cases under the Grand Jury Act, 1836, as enlarged by the 5th section of the Local Government Act a much large volume of malicious injury cases may arise for compensation than could possibly be entertained under the former jurisdiction, and that the true interpretation of the Act is of great importance to the Corporation as representatives of the city ratepayers. Whatever that former jurisdiction was, there can be no doubt that the 5th section of the Act transfers it to the County Court. Certain powers of compensating for malicious injuries were vested in the Grand Jury of the city of Dublin under the Whiteboy Acts (15 & 16 Geo. 3, c. 21 (Ir.); 36 Geo. 3, c. 32 (Ir.)); the 4 & 5 Vict. c. 10; the 11 & 12 Vict. c. 69; and the 16 & 17 Vict. c. 38; but by the 12 & 13 Vict. c. 97, ss. 40, 41, the fiscal powers of the Grand Jury of the city thenceforth ceased and became vested in the Corporation. The 5th sect. (sub-sect. 1) of the Local Government Act transfers to the County Court the business of Grand Juries in relation to compensation for criminal injuries under the enactments mentioned in the 1st part of the

1st schedule to the Act, and that schedule includes the Grand Jury Act of 1836 and the two Acts just mentioned, viz. 11 & 12 Vict. c. 69, and 16 & 17 Vict. c. 38. The 21st sect. sub-sect. 2 (*e*) then declares that the provisions of the Act with respect to such compensation shall apply, although the business has before the Act been vested in the council of a borough. It is therefore apparent that whatever powers of granting compensation for malicious injuries committed in the city of Dublin were exercisable by the Corporation under any of the enactments mentioned in the 1st part of the 1st schedule to the Local Government Act, they have been transferred to and are now vested in the Recorder of Dublin. But the Corporation had no power of compensating for malicious injuries under the Grand Jury Act of 1836 (6 & 7 Wm. 4, c. 116). The 7 Wm. 4, c. 2, s. 2, declared that the Grand Jury Act of 1836 was not to effect or extend to the county or the county of the city of Dublin; and it is stated by counsel for the Corporation, and so far as I can discover, quite correctly, that there has been no statutory extension of the Act to the city since that date. Therefore the only enactments mentioned in the 1st schedule to the Local Government Act which applied to Dublin were the 11 & 12 Vict. c. 69; the 16 & 17 Vict. c. 38, and section 515 of the Merchant Shipping Act, 1894. The injuries embraced in these statutes were only such as resulted from riotous and tumultuous assemblies, and the Corporation contend that the only effect of section 5 of the Local Government Act is to make a change in the body or tribunal that is to award compensation without, in the city of Dublin, extending the jurisdiction to cases other than those under the three statutes I have just mentioned. So far as this contention is limited to the effect of sub-section 1 of the 5th section, I am inclined to adopt it. That sub-section standing alone, cannot be read as conferring on every County Court the powers derived under each of the four statutes mentioned in the 1st part of the 1st schedule to the Local Government Act, unless the Grand Jury or Borough Council was antecedently possessed of them. In my opinion it only transferred to each County Court whatever jurisdiction had hitherto existed in the Grand Jury or Borough Council of the particular county. Where the Grand Jury Act of 1836 did not already apply—as in the city of Dublin—this

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sub-section did not apply it, and consequently an express provision for the purpose was necessary. That provision is to be found in the 9th sub-section which says that the enactments in the 1st part of the 1st schedule, and the 5th section, are to extend to the whole of Ireland, so far as they do not already so extend, and its language is in my judgment too clear to be effectually met by the argument that by Schedule 6, Part 1, of the Local Government Act and by the Local Government (Adaptation of Irish Enactments) Order of the 30th January, 1899, that portion of the 2nd section to which I have referred of the 7 Wm. 4, c. 2, which exempts the city of Dublin from the operation of the Grand Jury Act of 1836, is expressly recognized as of continuing force. If that section of the Act of the 7 Wm. 4 had found a place in the Act of 1836 instead of in an independent statute there would not, in my opinion, be any necessity to repeal it in order to make the rest of the Acts applicable to the city of Dublin by such a clause as sub-section 9. That sub-section in effect says that although there be in force a legislative enactment declaring that Dublin is outside the Grand Jury Act of 1836, yet for the future the exemption is to cease, and there is to be a practical repeal of the exempting section. In no other way could a coherent interpretation be given to the 5th section of the Local Government Act; and I therefore hold that the sections of the Grand Jury Act of 1836, mentioned in the 1st part of the 1st schedule to the Local Government Act now apply in the city of Dublin with, necessarily, the extensions provided in the 1st sub-section of the 5th section.

I therefore affirm the decision of the Recorder of Galway, who in this case was nominated to sit in place of the Recorder of Dublin, as the latter happened to be a member of the Church Representative Body—the plaintiffs in the civil bill.

I may add that I have been referred to a recent decision of the Court of Appeal in Ireland in a case of *Mairs* v. *Corporation of Belfast* (1) where the Court had to consider whether a jurisdiction previously vested in the Corporation of Belfast under a local statute enabling them to give compensation in certain cases when the damage did not exceed £5, had been transferred to the County

(1) Since reported [1901] 2 I. R. 1.

Court. In holding that it had not been transferred it would appear from the note of the Lord Chancellor's judgment, which the reporter in the Court of Appeal (Mr. Dixon) has been good enough to let me see, that the Court was of opinion that the 9th sub-section of the 5th section extended to the whole of Ireland—in every case—the provisions of the Grand Jury Act of 1836. The decision of the point does not seem to have been essential to the judgment of the Court, and I do not know if it was fully discussed; and consequently I have thought it advisable to go more fully into the question than otherwise I would have done.

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1900.

REP. CHURCH BODY *v.* CO. COUNCIL OF DUBLIN.

Appeal.
1900.
Nov. 23, 27.

The Council of the County Borough of Dublin appealed by way of case stated to the Court of Appeal.

The Right Hon. The Macdermot, Q.C., and *P. A. O'C. White*, for the appellants.

J. P. Brett, for the respondents.

THE COURT OF APPEAL (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.), affirmed the decision of Kenny, J., and dismissed the appeal with costs.

Solicitor for the Representative Church Body: *Gerald Byrne.*

Solicitor for the Council of the County Borough of Dublin: *Rice.*

Solicitor for the Council of the County of Dublin: *Shannon.*

G. Y. D.

Q. B. Div. 1900.
Nov. 21.

PATTESON *v.* NORTHERN ACCIDENT INSURANCE COMPANY, Limited (1).

(1900. No. 12,602.)

Practice — Arbitration — Policy of insurance—Accident—Liability to third parties—Defence of action—Negligence — Motion to stay proceedings—Common Law Procedure (Ireland) Act, 1856, sect. 14.

P. was insured with the Company to the extent of £100 against liability for injuries caused to third parties through the negligence of his servants, it being a condition precedent to his right to sue the Company under the policy that he should accept arbitration if required. A sum of £270 having been awarded against him in respect of a cause of action contemplated by the policy, P. charged that the Company had been guilty of negligence in the conduct of the defence, and, refusing arbitration, sought in this action to recover from the Company the full sum of £270, together with the costs on both sides of the former proceedings. The Company was willing to pay the £100, together with the costs on both sides, upon such sum being accepted in final settlement. Otherwise they reserved the right to defend as to the entire amount claimed in this action, inasmuch as they charged that P.'s alleged interference in the defence of the former action was the cause of the award of damages against him:—

Held, upon a motion by the Company under sect. 14 of the Common Law Procedure (Ireland) Act, 1856, that, as the substantial portion of the present action was founded upon negligence, the Court should not stay the proceedings.

Motion by the defendant Company under the 14th section of the Common Law Procedure (Ireland) Act, 1856, to stay all proceedings in the action. The plaintiff claimed damages for breach of contract to insure him against liability to third parties, caused through the fault or negligence of his drivers, and for loss under a policy of insurance, and for damages for breach of contract to

(1) Before Boyd, Kenny, and Barton, JJ.

indemnify him, and for damages for negligence in the defence of a certain action of Robinson *v.* Patteson of which the defendants undertook the defence.

A policy of insurance was executed on the 29th June, 1897, whereby the Company agreed to pay the plaintiff any sum not exceeding £100 which the plaintiff might be held liable to pay as compensation for personal injuries to persons not in his employment, caused by the default or negligence of his drivers. In the year 1899, a third party named Robinson brought an action against the plaintiff, Patteson, for £500 damages for personal injuries caused by the negligence of his driver. The trial resulted in a verdict against Patteson for £270. The Company had intimated in a letter that they were prepared to pay £100, the limit of their liability under the policy, and the costs on both sides, making the total sum of £312 19*s.* 4*d.*, upon hearing definitely that the same would be accepted in final settlement of all claims. Patteson, however, contended that the Company was liable to him for the full sum of £270 awarded by the jury in the case of Robinson *v.* Patteson, together with the costs on both sides, making in all £582 19*s.* 4*d.*, upon the grounds that he had not been consulted about the defence that ought to have been made, and that the Company had been guilty of negligence and mismanagement in refusing offers of settlement and in not applying for an adjournment of the trial, owing to his illness, and in not informing him that the trial was proceeding. These allegations were denied by the defendants, who said that the offers of settlement were rejected, and the claim was resisted, in consequence of plaintiff's statements that he could prove that he was not liable at all in the action.

By the terms of the policy it was a condition precedent to the right of the insured to sue under it that the insured should, if required by the Company, refer to arbitration any question or difference touching the meaning of the policy and its conditions, or the rights, obligations, or liability of either party thereunder. The Company had offered to submit the present claim of the plaintiff to arbitration, but he refused. The defendants contended that his refusal was in violation of the agreement, and accordingly instituted the present motion to stay the action.

Q. B. Div. 1900.

PATTESON v. NORTHERN ACCIDENT INSUR. CO.

Campbell, Q.C. (with him *Chambers*), for the defendants :—

The parties under the policy have agreed to refer their difference thereunder to arbitration, and no sufficient reason is suggested why this claim cannot be, or ought not to be, referred to arbitration according to the agreement. Having regard to Patteson's interference in the defence of Robinson *v.* Patteson, the defendants are now within their right in disputing the whole claim. The count for negligence comprises only a minor portion of the total amount in dispute, and is inserted for the purpose of attempting to get rid of the arbitration clause.

[He referred to *Randegger* v. *Holmes* (1) and *Ives and Barker* v. *Willans* (2).]

Henry, Q.C., and *Donaldson*, for the plaintiff :—

The whole question in dispute here arises upon the count for negligence. The 14th section of the Common Law Procedure Act, 1856, in giving the Court jurisdiction to stay proceedings, bases it entirely upon discretion which must be exercised according to the merits of each particular case. The questions arising upon the count for negligence are not proper matters for the arbitrators.

[*Moyers* v. *Soady* (3), *Joplin* v. *Postlethwaite* (4), *Turnock* v. *Sartoris* (5), *Scott* v. *Avery* (6) were referred to.]

Chambers, in reply.

BOYD, J. :—

We do not desire to express any opinion as to whether there is anything to be tried under the head of negligence. There is no application made to us to strike the count out of the writ, and we have no authority to strike it out. The count must stand, and the claim for negligence must go before a jury. After the letter that was written by the defendants, we think that really the only case remaining to be tried, is upon the question of negligence.

(1) L. R. 1 C. P. 679.
(2) [1894] 2 Ch. 478.
(3) 18 L. R. Ir. 499.
(4) 61 L. T. (N. S.) 629.
(5) 43 Ch. D. 150.
(6) 8 Ex. 487; 5 H. L. C. 811.

The offer of £312 19*s.* 4*d.*, conveyed in the letter of the Company to the plaintiff was the entire amount of £100 secured by the policy and the entire amount of the costs upon both sides *plus* the sum of five guineas that was allowed by them for the opinion of counsel. Now, under all these circumstances, I do not see—and my brothers agree with me—how the Company can possibly defend in respect of this sum of £312 19*s.* 4*d.* The argument that has been addressed to us would seem to show the difficulty that exists in the matter, because it has been contended that the questions arising upon the count for negligence were not proper matters for the arbitrators. That shows the difficulty of splitting this action into two. There is no doubt that the Court has power, as decided in *Ives and Barker* v. *Willans* (1), if they think fit to separate the action that has been brought, and refer one portion to arbitration, and let the other portion go on in the regular course. I think it is an extremely inconvenient course that an arbitration should be going on in one place, and that an action of negligence arising out of the same matter should be going on in another. There may be some cases, such as the case to which I have referred, in which it would be advisable, but I do not think it would be advisable in this case. For these reasons the application must be refused with costs.

KENNY, J.:—

I concur. There are two causes of action—the one, on the policy itself in respect of the failure on the part of the defendants to indemnify the plaintiff against liability to third parties, and the other, for damages for negligence in the defence of the action of Robinson *v.* Patteson. The first cause of action is admittedly within the arbitration clause in the policy. That the other is outside the policy and incapable of being referred to arbitration, is equally clear, and it must be dealt with as wholly independent of the matters in dispute under the policy.

There is no doubt that the Court has power to refer one of these causes of action and to retain the other, or in proper

(1) [1894] 2 Ch. 478.

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Kenny, J.

circumstances to decline to refer the cause of action capable of being referred, and to retain both causes. The consideration that should weigh with the Court, in such cases, is the respective magnitude and weight of the two claims.

If the larger claim be that which consists of matters that may be referred to arbitration, then those matters should be referred, and the other cause of action retained. If, on the other hand, the matters that may be referred are small in degree, then the Court may probably keep the whole action, and decline to refer any part.

With regard to the claim on foot of the policy, it appears that a letter was written by the defendant Company, offering every single farthing that can be recovered under the 5th clause of the policy of insurance. That being so, there is nothing to arbitrate on, though Mr. Campbell did suggest, but not, I think, with much earnestness, that that offer might be withdrawn, on the ground that the plaintiff interfered with the defendants' control and prosecution of the defence in the action of Robinson *v.* Patteson, and, therefore, that there might be a substantial matter for arbitration. This argument was really not pressed, and we must take it that the defendants are prepared to pay the full amount that plaintiff could recover in any arbitration. The other cause of action must be disposed of here, and I offer no opinion as to whether it is one of substance.

BARTON, J. :—

I concur. In my opinion this case is very unlike the case of *Ives and Barker* v. *Willans* (1). That was a case in which the matters in dispute were the usual subject-matter of these arbitrations, namely, disputed items and amounts, of which only a few trifling items were outside the scope of the arbitration. The present case is very different. The amount of the insurance money is £100, and there is no dispute as to amount or liability in respect of it. The only other point which has been suggested as being in dispute, under the arbitration clause, is the question of the liability of the Insurance Company for the taxed costs of the

(1) [1894] 2 Ch. 478.

action in which Patteson was defendant. There is no dispute about the amount of those costs. They have been taxed, and ascertained, and the defendants have offered the full amount to the plaintiff. However, the plaintiff has put forward a further claim against the defendants for alleged negligence in conducting the action in which these costs were incurred. In view of this further claim the defendants say that they are prepared to withdraw their offer, and to dispute their liability in respect of these costs. Accordingly, two questions remain to be decided between the parties, namely, the claim for the taxed costs, and the claim for damages for negligence. I think we ought not to send these two questions to different tribunals. We cannot send them both to arbitration, because the second question is outside the arbitration clause. But we can send them both to a Court of Law, and I can see no reason why they should not both be tried in the same action.

Solicitor for the plaintiff: *A. N. Sheridan.*
Solicitors for the defendants: *Carson & M'Dowell.*

J. L.

ARMSTRONG *v.* ARMSTRONG (1)

(1900. No. 9250.)

Practice—Security for costs—Step in the cause or matter—Gen. Ord. XXIX., Rule 1.

A defendant who has filed affidavits in opposition to, and has appeared in Court to resist, a motion or final judgment, has not taken any step in the action within the meaning of General Order XXIX., Rule 1, and is not thereby precluded from applying for an order for security for costs.

SUMMONS FOR SECURITY FOR COSTS.

The plaintiff who resided in the United States, sued for £52 1*s.* 10*d.* for money had and received by the defendant for the

(1) Before KENNY, J.

Q. B. Div. 1900.

ARMSTRONG v. ARMSTRONG.

use of the plaintiff on foot of a certain deed, dated the 19th December, 1899, whereby the defendant undertook and agreed to receive certain sums in trust for the plaintiff. The writ of summons was issued on the 13th July, 1900; the defendant entered an appearance on the 21st July, and the plaintiff moved for final judgment on the 4th August following. The defendant filed three affidavits in opposition to the motion for final judgment and appeared by counsel upon the hearing of same before the Vacation Judge. The motion for final judgment was refused, the Judge ordering that the costs of both parties should be costs in the cause.

Horner, for the defendant, in support of the application.

Law Smith, for the plaintiff :—

The defendant, by filing affidavits, and appearing to resist the motion for final judgment, has taken a step in the action other than the entering of an appearance. Consequently his summons for security for costs is late. He referred to *Lydney* and *Wigpool Iron Ore Company* v. *Bird* (1); *Tellett* v. *Lalor* (2); *Tucker* v. *Horseman* (3).

Horner, in reply :—

The defendant has taken no voluntary step in the action. The motion for final judgment was a step taken by the plaintiff, and the defendant only did what was necessary to resist it. He referred to *Duffus* v. *Scullin* (4).

KENNY, J., held that the filing of affidavits and the resistance offered by defendant's counsel in Court to the motion for final judgment did not constitute "a step" in the action within the meaning of Order XXIX., Rule 1. Even if it were a "step," there were special circumstances in this case which would justify him in making an order for security for costs.

Solicitor for the plaintiff: *T. J. Mayne.*
Solicitor for the defendant: *A. C. Cooney.*

J. L.

(1) 23 Ch. D. 358.
(2) 8 L. R. Ir. 8.
(3) 1 Smythe, 90.
(4) 20 L. R. Ir. 8.

GORE *v.* GORE (1).

(1899. No. 4441.)

Q. B. Div.
1900.
Nov. 12, 13.

Promissory note—Principal—Surety—Discharge of debt—Money paid.

The plaintiff and defendant gave a bank their joint and several promissory note, the plaintiff being surety for the defendant. The plaintiff, when the note was overdue, gave the bank, in payment and discharge of the joint and several note, his own sole note, and was accepted as sole debtor. It was not shown that the defendant knew of or assented to this transaction. Afterwards the plaintiff executed to the bank a mortgage, charged on his property, which was of adequate value to secure repayment of the debt and interest. The note and mortgage were unpaid when the action was brought:—

Held, by the Court, that in an action for money paid, the plaintiff was entitled to recover, and that, if necessary, the pleadings ought to be amended, though no amendment was asked for at the trial.

Per Gibson, J., that the case was governed by *M'Kenna* v. *Harnett* (13 Ir. L. R. 206).

Per Kenny, J., that the case fell within *Fahey* v. *Frawley* (26 L. R. Ir. 78).

MOTION by the plaintiff to set aside the verdict and judgment entered for the defendant at the trial.

The action was by John Gore against his brother James Gore, for principal and interest paid by the plaintiff, as defendant's surety, on foot of plaintiff's and defendant's joint and several promissory note, dated the 30th October, 1895. It was tried, without a jury before Mr. Justice Barton (2), who entered a

(1) Before MURPHY, GIBSON, and KENNY, JJ.

(2) Mr. Justice Barton's judgment was as follows:—

On October 30, 1895, John Gore and James Gore gave to the Hibernian Bank a joint bill or note for £85 19*s.*, out of which, in respect of £60 (and interest thereon) James Gore was principal, and John only surety. On November 14, 1896, the bank took from John Gore a sole promissory note for £92 4*s.* 6*d.*, made up of the amount of the old joint note and further interest and discount. The Bank manager said in his evidence that he took this sole note in satisfaction of the old note, putting the whole liability on John and releasing James. Such may have been his intention, and John Gore said in his evidence that he so understood the incident. But the Bank manager never communicated his intention to James Gore, and James Gore was not in any

Q. B. Div. 1900. GORE v. GORE.

verdict and judgment for the defendant. A sum of £60 remained due to the Hibernian Bank by James Gore, on foot of a note passed by him and Alicia Clarke in 1890, and renewed several times until the next year, when Alicia Clarke died. In 1892 John Gore owed the bank a balance of £20 on his own account, and on the 18th July, 1892, the bank took a joint and several promissory note for £91 6*s.* from John and James Gore, consisting of the £60 due by James and the £20 due by John, £5 cash, and the balance for interest and discount. On the 14th April, 1892, there was a payment of £10, and on the 4th September another payment of £10, there being no evidence as to which of the brothers paid these two sums. On the 14th October, 1892, the bill was renewed for £92 14*s.* 6*d.*, which was a renewal of the bill for £91 6*s.*, with discount and interest, and, on the 30th October, 1895, there was a joint renewal for £85 19*s.*, representing £75 and interest that had accrued in the interval. In 1896 James Gore was evicted from his farm, and, on the 11th November in that year, the Bank wishing to get rid of James in the transaction, took the sole promissory note of John for £92 4*s.* 6*d.*, made up of the old amount of

way a party to the transaction. Subsequently the bank took, as further security from John Gore a mortgage of his farm, with a deposit of the lease and of his document of title, and the bank considered themselves fully secured for the whole of John Gore's liability to them, including his liability on this note. Under these circumstances John Gore sues James Gore for the amount for which he was surety for James in the joint note of October 30, 1895, claiming it as money paid by him to the use of James. John Gore admits that he has not paid any money to the use of James, but he submits that the giving of the sole note on November 14, 1896, and the giving of the mortgage on his farm amount to virtual payment, and he relies on *Barclay and Proctor* v. *Gooch* (2 Esp. 571) and *M'Kenna* v. *Harnett* (13 Ir. L. R. 206). It is, on the other hand, argued for the defendant that these cases have been overruled, and are no longer law. Before referring to the cases which are cited as overruling these cases, I should like to point out that in the case of *Maxwell* v. *Jameson* (2 B. & Ald. 51) Holroyd, J., said that "in order to make the giving of a bond operate as a virtual payment, the defendant must be shown to have been a party to the transaction." If that is the law, and if the case of a bond stands on the same footing as a bill or note, the dictum of Holroyd, J., would render the case of *Barclay and Proctor* v. *Gooch* inapplicable to the present case, because in this case the defendant was not a party to the transaction and received no notice of it. I find it difficult to see how the defendant's liability was discharged in this case. The intention of the bank

£85 19*s.*, with interest and discount, thereby intending to put the whole *onus* on John, and to release James altogether. The bank never informed James of the intention to release him. Some time afterwards the bank took a mortgage from John of the lease of his farm and letters of administration to Alicia Clarke, which was his document of title, to further secure the amount due on the note which still remained unpaid.

Upon the foregoing facts Mr. Justice Barton entered a verdict and judgment for the defendant. He declined to find as fact that the sole note of John Gore had been accepted by the bank in satisfaction and discharge of James's liability, leaving it to the Court to draw its own inferences from the uncontradicted evidence on the subject, and calling attention to the inferences he himself drew in the course of his judgment.

The plaintiff moved to set aside the verdict and judgment for the defendant and enter judgment for him on the ground of misdirection of the learned Judge who tried the case, inasmuch as the defendant's liability to the Hibernian Bank in respect of the joint and several note had been satisfied and discharged by the bank manager was not communicated to defendant, or embodied in a deed as in *Fahey* v. *Frawley*. If the bank had changed its mind and had sued the defendant, what defence would he have had, even if he had known of the manager's intention of which he was wholly ignorant? However, I do not rest my judgment on this point. In the case of *Whelan* v. *Crotty* (2 I. L. T. 285) Deasy, B., in a considered judgment on a civil-bill appeal, held that the case of *Barclay and Proctor* v. *Gooch* had been in effect overruled by the subsequent English cases. It is strange that Deasy, B., does not seem to have noticed the Irish case of *M'Kenna* v. *Harnett*, which upheld *Barclay and Proctor* v. *Gooch*. However, in the more recent case of *Fahey* v. *Frawley* (26 L. R. Ir. 78), Holmes, J., considered all the cases, and expressed the opinion that the cases of *Barclay and Proctor* v. *Gooch* and *M'Kenna* v. *Harnett* can no longer be considered law. I feel inclined, even if I am not bound, to follow that opinion, and to hold that there has been in this case, in which I have not been asked to amend the pleadings, no such virtual payment as would support this form of action. In *Fahey* v. *Frawley* the plaintiff succeeded, but what was given by the plaintiff in that case was something which might be fairly regarded as a money payment of ascertained value and amount. What was given in this case was very different. I therefore give judgment for the defendant. If judgment ought to have been given for the plaintiff it would be judgment for £50 principal, and an amount for interest which I understand the parties are prepared to agree on.

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accepting the sole note of the plaintiff and a mortgage by the plaintiff in satisfaction and discharge thereof, and inasmuch as the plaintiff's promissory note and mortgage were a full equivalent for the defendant's liability to the bank, and inasmuch as the evidence showed facts amounting to payment in money by the plaintiff in respect of the defendant's liability to the bank, and further that upon the evidence it appeared that the defendant had ceased to be liable to the bank in respect of his promissory note, and that upon these undisputed facts of the case the learned Judge should have directed a verdict for the plaintiff; and also for a new trial on the ground that the verdict was against evidence and the weight of evidence, and inasmuch as there was no evidence in support of the defendant's case.

The Right Hon. C. H. Hemphill, Q.C., and *Philip White*, for the plaintiff.

Ignatius O'Brien, Q. C., and *Timothy Sullivan*, for the defendant.

The following cases were referred to in the arguments:—*Fahey* v. *Frawley* (1); *Barclay* v. *Gooch* (2); *M'Kenna* v. *Harnett* (3); *Moore* v. *Pyrke* (4); *Bandy* v. *Cartright* (5); *Maxwell* v. *Jameson* (6); *Taylor* v. *Higgins* (7); *Israel* v. *Douglas* (8); *Brittain* v. *Lloyd* (9); *Whelan* v. *Crotty* (10); *Power* v. *Butcher* (11); *Lyth* v. *Ault* (12); *Matthews* v. *Saurin and the Provincial Bank, Limited* (13).

Nov. 13.

GIBSON, J.:—

The question raised in this case is treated as doubtful in leading text-books such as Mayne on Damages, and Sedgwick on Damages. An action for money paid can only be supported by proof of a payment in money or something equivalent to such

(1) 26 L. R. Ir. 78.
(2) 1 Esp. 571.
(3) 13 Ir. L. R. 206.
(4) 11 East, 52.
(5) 22 L. J. Exch. 285.
(6) 2 B. & Ald. 51.
(7) 3 East, 169.
(8) 1 H. Bl. 239.
(9) 14 M. & W. 762.
(10) 2 Ir. L. T. 285.
(11) 10 B. & C. 329.
(12) 7 Exch. 669.
(13) 31 L. R. Ir. 181.

money payment. Where the payment is in goods (*Hooper* v. *Stephens* (1)), or by way of settlement by a cross demand (*Spargo's Case* (2)) of equivalent value, there is usually no difficulty. For some purposes, as in cases under the Statute of Limitations, there may be a good constructive payment without either money or goods passing: *Maber* v. *Maber* (3). But where the thing agreed to be received in payment may be substantially of less value, the question arises in an action like the present whether the surety, whose right to sue is based on indemnity, and not on a transfer to him of the debt by the creditor, can recover from the principal debtor damages beyond the loss which the surety has himself sustained. He is certainly not subrogated into the creditor's right. On the other hand there is an obvious convenience in allowing the creditor and surety to make their own bargain as to payment, without any inquiry as to value, or referring the question of adequacy to the decision of a jury. Suppose that the surety paid off this debt by giving a horse which both parties *bona fide* agreed was value for the debt, could the principal debtor afterwards insist on the value being assessed by a jury?

Where the payment is made by a negotiable instrument accepted in discharge of the original liability, it was decided in *Barclay* v. *Gooch* (4) by Lord Kenyon, that such acceptance in discharge was equivalent to payment. This decision, which was approved of by the Court in *banco*, was followed by Pennefather, Lefroy, and Richards, BB., in *M'Kenna* v. *Harnett* (5). It was treated as good law by Pollock, C.B., in *Rodgers* v. *Maw* (6). Such negotiable instrument might be indorsed over, and is for many purposes treated as cash, like a cheque. A different principle was applied to bonds and similar securities. But though in cases of this latter type, *Barclay* v. *Gooch* (4) was doubted, I am not aware of any decision inconsistent with it, except the circuit case, *Whelan* v. *Crotty* (7), where, unfortunately, Deasy, B. was not aware of the unanimous judgment of his own Court the other way. *Fahey* v. *Frawley* (8) is not as a decision adverse to *M'Kenna* v. *Harnett* (5).

(1) 4 A & E. 71.
(2) L. R. 8 Ch. App. 407.
(3) L. R. 2 Exch. 153.
(4) 1 Esp. 571.
(5) 13 Ir. L. R. 206.
(6) 15 M. & W. 444.
(7) 2 Ir. L. T. 285.
(8) 26 L. R. Ir. 78.

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No question arose in that case of a negotiable instrument being payment; and the adverse criticism of Holmes, L.J. is met by the opinion of Murphy, J. Unfortunately, the view of Harrison, J. on the subject cannot be discovered from the report. Without expressing any approval of the decision, I think this Court is bound to defer to the authority of *M'Kenna* v. *Harnett* (1), which appears to accord with the bulk of American judicial opinion, and which has never been overruled by any competent Court. At the same time I feel great difficulty in treating a note as cash paid, and I quite appreciate the criticism of Holmes, L.J. Suppose that the plaintiff, after the creditor's acceptance of the note, paid it by a small composition under an arrangement, could he afterwards sue the defendant for the entire sum? It may be that the bill accepted in discharge of the original liability is regarded as cash at the time for the purpose of satisfying the old debt, the parties agreeing to treat the negotiable instrument as equivalent to the sum due. Or possibly the true value of the negotiable paper might have to be determined irrespective of the agreement of the parties. A bill with first class names might be as good as cash, while paper of inferior quality might be worth much less. This latter view would seem attended with great difficulty.

If the new note, given and taken in full satisfaction, was not such a payment as to support an action for money paid, I doubt if the mortgage subsequently executed could improve the plaintiff's position. It was given by way of security long after the note, and was not like the transfer in *Fahey* v. *Frawley* (2), which was an absolute conveyance, and which itself was the instrument of release. Whether the thing given in payment is land, goods, or any other article of value, is immaterial. But that a security is not payment, is shown by the American cases cited in Sedgwick, to which Holmes, L.J., refers.

If *M'Kenna* v. *Harnett* (1), was treated as overruled, I think that, upon the facts which are unquestioned, the plaintiff ought to be allowed to amend and ask for alternative relief either by way of indemnity (*Wolmershausen* v. *Gullick* (3)), or in the form of damages for breach of obligation to indemnify. The plaintiff's

(1) 13 Ir. L. R. 206. (2) 26 L. R. Ir. 78. (3) [1893] 2 Ch. 514.

claim on this head would be substantially the same as for money paid. The mortgage is in this point of view material. It is charged on the plaintiff's property, which is of adequate value, and the money loss to the plaintiff from the defendant's failure to pay is ascertained. No question of amendment was suggested before Mr. Justice Barton. I find it hard to understand how, after *Fahey* v. *Frawley* (1), the plaintiff's cause of action was confined in the pleading to money paid, but the justice of the case requires that an amendment should be allowed. As I think that this Court, as a tribunal of first instance, are compelled to follow *M'Kenna* v. *Harnett* (2), no question of amendment properly arises before us.

The learned Judge at the trial attached importance to the fact that the defendant was not shown to have assented to the transaction relied upon as constituting payment. No doubt, novation or alteration of a contract requires the concurrence of all parties; but payment can be made by one of several debtors; and in *Barclay's Case* (3), *M'Kenna's Case* (2), and *Fahey's Case* (1)—all instances of virtual as distinct from actual payment—the report does not show any assent by the defendant. The learned Judge was under a mistaken impression as to *Fahey's Case* (1). The defendant was not there a party to the release, so far as one can judge from the report.

I think that *M'Kenna's Case* (2) can only be supported on the ground of the peculiar character of negotiable instruments, which differ from ordinary contracts or bonds in many respects. Thus a bill may be forgiven without consideration (*Foster* v. *Dawber* (4)) at common law: it is frequently regarded as cash, and when out of the holder's possession he cannot sue without an indemnity.

KENNY, J.:—

I concur in thinking that judgment should be entered for the plaintiff.

In its facts the present case is closely akin—if not quite similar to *Fahey* v. *Frawley* (1). In the latter, no money was paid by

(1) 26 L. R. Ir. 78.
(2) 13 Ir. L. R. 206.
(3) 1 Esp. 571.
(4) 6 Ex. 839.

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the plaintiff to the common creditor in respect of the debt. A mortgage was transferred, and the plaintiff—the surety—was released. There was no evidence of any consent on the part of the defendant to the transaction. There was a more meagre endorsement on the writ of the plaintiff's claim than in the present case, and the defences were traverses of money having been paid. The plaintiff went to trial on these traverses, and the majority of the Divisional Court upheld the judgment that had been entered for the plaintiff—on the ground, that to the extent at least of the value of the security given by the plaintiff there had been a payment of money or its equivalent, which entitled the plaintiff to maintain the action. It was sought there, as it has been sought here, to discuss the case from the standpoint of technical pleading—the arguments proceeding on the ground that the action was one on a simple *indebitatus* count for money paid, with a traverse thereto and issue thereon. It is a little late in the history of our legal procedure to ask us to follow on such a path. By the existing Rules of Court "no technical objection shall be raised to any pleading on the ground of any alleged want of form" (Order XIX., Rule 27), and "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties" (Order XXVIII., Rule 1). Counsel for the plaintiff says he requires no amendment of his writ, but if we thought such amendment necessary he asks us to make it, though not applied for at the trial. In my opinion his writ gives all necessary information to the defendant of the nature of the plaintiff's claim, and it is immaterial whether the latter, as it appears on the writ, be regarded as one sounding in damages for breach of defendant's implied contract of indemnity or for a liquidated demand in the shape of "money paid." Therefore I think the writ needs no amendment; but if an amendment were desirable or necessary we ought to have no hesitation in making it even at this stage.

Assuming, then, the plaintiff's claim to be made in the double aspect, I see nothing to distinguish the case in principle from that of *Fahey* v. *Frawley* (1). Holmes, J., in his judgment in that case dealt with the two forms of action—"damages" on the implied

(1) 26 L. R. Ir. 78.

indemnity, and "debt" for "money paid." On the former he was clearly of the opinion—in which I entirely concur—that the plaintiff was entitled to a verdict for the amount in which he was damnified by the assignment of the mortgage; and on the latter, he thought—and again I concur—that the transfer of property possessing a certain marketable value was equivalent to the payment of money. In both of these conclusions Murphy, J., agreed, but he went further, and regarding the case of *Barclay* v. *Gooch* (1) as good law—justified as it was by the decision in *M'Kenna* v. *Harnett* (2), of Richards, Pennefather, and Lefroy, BB., in the Court of Exchequer in this country—he was prepared to decide that the acceptance by the creditor of a personal security, such as a bill of sale or a promissory note, might be an equivalent for "money paid," though no actual payment on foot of it had been made. Cases have been cited to us that are in conflict with these decisions, but in the facts with which we have here to deal, and in the view I take, it seems to me that a discussion of them is unnecessary. I cannot agree with the learned Judge who tried this case that to form a basis for the plaintiff's claim it was necessary that the defendant should have been a party to, or have had notice of the acceptance by the creditor of, the new note and the mortgage. I am of opinion that *Fahey* v. *Frawley* (3) is a sound decision and undistinguishable from this case, and that we should follow it. Even if we did not concur in it we should, in my opinion, follow it as being the decision of a Court of co-ordinate jurisdiction on facts similar to those in the case before us. I may conclude by saying that on the evidence of the Bank manager, which is not controverted, the marketable value of the property mortgaged is more than the £50 to which Barton, J. finds the plaintiff is entitled if judgment should be entered for him. The creditor is therefore fully secured, and the plaintiff being damnified to the extent of the security given by him is entitled to be indemnified in respect of its value, namely, £50 and interest.

MURPHY, J., concurred.

Solicitor for the plaintiff: *John C. Sullivan.*

Solicitor for the defendant: *James Brady.*

J. L.

(1) 1 Esp. 571. (2) 13 I. L. R. 206. (3) 26 L. R. Ir. 78.

Q. B. Div. 1900.

GLASGOW *v.* INDEPENDENT PRINTING CO. (1).

Feb. 1, 2, 14. *Appeal.* June 7, 14, 25.

Master and servant—Wages—Payment otherwise than in current coin of the realm—Agreement by workman to accept payment of portion of his wage in scrip of the company by whom he was employed—Truck Act (50 & 51 *Vict. c.* 46)*—Agreement signed by those in common employment with the plaintiff.*

On a case stated upon the hearing of a civil bill appeal it appeared that the plaintiff was employed by the defendants as a journeyman machinist at 22*s.* per week. The case stated erroneously that in October, 1894, the plaintiff signed an agreement, along with his fellow-workmen, to accept "a *reduction* of 10 per cent. on his wages—20*s.* a week in cash and 2*s.* to be applied to purchase shares of the defendant company." The plaintiff was paid 20*s.* down to the 24th April, 1897, when he served notice on the defendants that he would not accept the reduced wages, and from that date until February, 1899, he was paid 22*s.* a week in cash. In February, 1899, he left the defendants' employment, and brought an action for £12, the difference betwen the 20*s.* and 22*s.* a week from the date of the agreement in October, 1894, to the 24th April, 1897:—

Held, by the Queen's Bench Division, who acted on the statement in the case, without seeing the agreement, which was supposed to be lost, that the contract entered into by the plaintiff was for a wage of 20*s.* and an addition of the purchase-money of scrip of the Company at the rate of 2*s.* a-week, and that the case was not within the Truck Acts.

Held, also, by the Queen's Bench Division, that even if the agreement were within the Truck Acts, the plaintiff, by its tripartite character, and the acquiescence of his fellow-workmen (some of whom were outside the Acts), and himself, was precluded from recovering.

In the Court of Appeal the original agreement was produced, from which it appeared that the contract was made on the basis that the plaintiff's wages continued to be 22*s.*, of which 2*s.* per week was to be satisfied by shares:—

Held, by the Court of Appeal, that the agreement was void under the Truck Acts, and the defendants were liable to pay so much of the plaintiff's wages as had not been paid in current coin of the realm; also that there was nothing either in the concurrence of the other workmen or in the plaintiff's own conduct to prevent him from recovering.

(1) In the Queen's Bench Division, before Sir P. O'Brien, L.C.J., and Andrews, Gibson, and Boyd, JJ.

CASE stated by Madden, J., on a civil bill appeal. The case was as follows:—

"Prior to October, 1894, the plaintiff had been employed by the defendants as journeyman machinist, an occupation of manual labour, at a weekly wage of 22*s*. In that month the defendants found it necessary to reduce their expenditure, and, after some negotiations with their staff, the following agreement which was produced in Court (1) was drawn up by a committee of the staff, and signed by the majority of the staff, including the plaintiff:—'The committee agree for themselves and will recommend to their fellow-workers for six months from the 1st November, a reduction in wages on the basis of 10 per cent. off all wages of £3 a-week and under, and of 20 per cent. on all salaries over £3, the deductions to be credited as subscriptions for ordinary shares. The committee also decide that as in carrying this agreement into proper effect it will be absolutely necessary that the entire staff should join it, they will recommend to the Board that the services of any employee not agreeing to it should be dispensed with.'

"Under this agreement the plaintiff was paid 20*s*. at the end of each week and the remaining 2*s*. was put to his credit in the defendants' books, and from time to time scrip of shares in the defendants' company to the amount of the sums then standing to his credit was delivered to the plaintiff and accepted by him. After the expiration of six months the same arrangement was carried on by mutual consent, though no new agreement was formally drawn up, and plaintiff continued in the defendants' employment on the same terms down to the 24th April, 1897. On that date the plaintiff intimated to the defendants that he would not remain on in their employment at the reduced rate of wages, and from the 24th April, 1897, until the 24th February, 1899, he was paid at the rate of 22*s*. a-week. On the latter date the plaintiff left his employment of his own motion, without giving notice to the defendants. The plaintiff never demanded the amount stopped by the defendants until after he had left their employment. During the period from the 1st November, 1894, until the 24th April, 1897, the difference between the plaintiff's former rate

(1) *i.e.* before MADDEN, J.

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of wages and the rate at which he was then paid amounted to £12. The defendants, in pursuance of the agreement, delivered to the plaintiff scrip for this amount, which was produced in Court" (1).

The Recorder of Dublin gave a decree for £12, the balance of wages due by the defendants, from which decree the defendants appealed.

The question for the Court was whether the plaintiff was entitled under the provisions of the Truck Acts to recover from the defendants the difference between the former and the reduced rate of payment?

Michael J. Dunn (with him, *Sullivan, Q.C.*), for the plaintiff.

J. O'Mahony (with him, *O'Shaughnessy, Q.C.*), for the defendants (2).

Feb. 14.

SIR P. O'BRIEN, L. C. J.:—

This is a difficult case. It is one too, in which we should proceed with great caution, because the manifestly immeritorious character of the plaintiff's claim renders the exercise of great care, indeed of what I might describe as severe introspection, essentially necessary, lest the impression of moral injustice, which is immediately created by a consideration of the facts, should in any way prejudice our minds in our endeavour to ascertain the true legal basis upon which our judgment should rest.

The construction of the Truck Acts, upon which the case depends, has produced in England an acute conflict of judicial opinion. In *Archer* v. *James* (3), which was argued in the Exchequer Chamber in England, six Judges were equally divided in opinion; and, in the case of *Hewlett* v. *Allen* (4), which went through every stage of legal discussion, from the Court of First Instance to the House of Lords, each tribunal differed in their

(1) Here followed a summary of the contentions of the respective parties. See *infra*, p. 281.

(2) The original agreement was not before the Divisional Court. It was supposed to be lost; and the argument proceeded on the assumption that it was accurately set out in the case. This turned out not to be so when the document itself was produced and examined in the Court of Appeal.

(3) 2 B. & S. 61; 31 L. J. C. P. 155.

(4) [1892] 2 Q. B. 662; [1894] A. C. 383.

reasons. The Court of Appeal differed in its reasons from the Court of First Instance, and the House of Lords differed from the Court of First Instance and from the Court of Appeal.

What are the facts of this case? They are to be found in the case stated for our determination by my brother Madden, and it is better to give them exactly as he stated them, giving not only the facts, but stating the contentions on both sides, and stating besides, which it is very essential to ascertain, the precise question ultimately evolved by the learned Judge for our determination.

"It appears in evidence" (the learned Judge tells us) "that for some time prior to October, 1894, the plaintiff had been employed by the defendants as journeyman machinist, an occupation of manual labour, at a weekly wage of twenty-two shillings. In that month the defendants found it necessary to reduce their expenditure, and after some negotiations with their staff the following agreement, which was produced in Court, was drawn up by a committee of the staff, and signed by the majority of the staff, including the plaintiff:—'The committee agree for themselves, and will recommend to their fellow-workers, for six months from 1st of November, a reduction in wages on the basis of 10 per cent. off all wages and salaries of £3 a-week and under; and of 20 per cent. on all salaries over £3, the deductions to be credited as subscriptions for ordinary shares. The committee also decide that as in the carrying out of this arrangement into proper effect it will be absolutely necessary that the entire staff should join in it, they will recommend to the Board that the service of any employee not agreeing to it should be dispensed with.'

"Under this agreement plaintiff was paid 20*s.* at the end of each week, and the remaining 2*s.* was put to his credit in defendants' books, and from time to time scrip of shares in the defendant company to the amount of the sums then standing to his credit was delivered to the plaintiff and accepted by him. After the expiration of six months the same arrangement was carried on by mutual consent, though no new agreement was formally drawn up, and plaintiff continued in defendants' employment on the same terms down to the 24th April, 1897. On that date the plaintiff intimated to the defendants that he would not remain on in their employment at the reduced rate of wages, and from the 24th April,

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1897, until the 24th February, 1899, he was paid at the rate of 22*s.* a-week. On the latter date the plaintiff left his employment of his own motion, without giving notice to the defendants. Plaintiff never demanded the amount stopped by defendants until after he had left their employment. During the period from the 1st November, 1894, until the 24th April, 1897, the difference between the plaintiff's former rate of wages and the rate at which he was then paid amounted to £12. The defendants, in pursuance of the agreement, delivered to plaintiff scrip for this amount, which was produced in Court. It was contended for the plaintiff that the deduction of 2*s.* a-week was illegal under the Truck Acts; that the payment of wages in shares was a payment 'otherwise than in coin of the realm'; and that plaintiff was entitled to recover the amount so deducted and paid. It was contended for the defendants that the agreement produced and signed by the plaintiff was an agreement to a reduced rate of wage, and not to a deduction from his former wages; and, as such, was outside the Truck Acts. That the plaintiff was estopped by acquiescence. That the section of the Truck Acts prohibiting set-off applied to goods only. That shares were not goods. That payment in shares was payment in cash, and that in any event the plaintiff was precluded at the date at which he brought his action from recovering the wages, if due, by section 5 of the Truck Act, 1896. The question for the Court is whether the plaintiff is entitled, under the provisions of the Truck Act, to recover from the defendants the difference between the former and the reduced rate of payment. If this question is answered in the affirmative the order of the Recorder should be affirmed with costs. If in the negative, the decree should be reversed, and the civil bill dismissed with costs."

Now, we have the facts—the contentions of the respective parties—and the question which we are to answer in the affirmative or negative according to our determination.

The learned Recorder of Dublin, from whom the case came on appeal before my brother Madden, gave a decree for the plaintiff for the full sum claimed, and he has very fully and lucidly stated in the order which he drew up the reasons upon which he acted. He prefaces his order by stating that the Court was of opinion that these actions (it appears there are a number of them, all of a

similar character) were, under the circumstances proved, unjust, inequitable, and ungracious, as the agreement suggested to be illegal was a voluntary proposition of the staff, when aware that the defendant company, for commercial reasons, were obliged to reduce their expenditure, and had full power legally to reduce their staff by dismissal or otherwise, or to reduce the rate of wages.

I entirely agree with these observations of the learned Recorder of Dublin, and would add that the immeritorious character of the plaintiff's claim seems to me to be aggravated by the fact that the Board of Directors of the "Independent Printing Company" were urged by the employees, who were parties to the agreement, which the plaintiff now repudiates as illegal, to dismiss all who would not accept its terms. The plaintiff repudiates that very agreement which originated with himself and other employees without contrivance or pressure on the part of the defendants—an agreement which has been fulfilled to the very letter by the defendants, and the non-acceptance of which by the other employees was urged upon the defendants as a ground for their dismissal—and that, too, although some, as was not denied, of the staff of the Company, who were parties to the agreement, did not come within the definition of workmen or artificers as used in the Truck Acts. They were always to remain bound by the agreement they entered into, although the plaintiff, who subscribed the same agreement, which was to form the basis of the common action of all, is to be permitted to repudiate it, not only with reference to the defendants, but with reference to all his co-contractors, in respect of some of whom, at least, the Truck Acts, admittedly, can give no relief.

However, if the statute allows all this, we must not permit what we may consider deflection from a moral standard to override the requirements of the law.

What, then, does this agreement which was entered into between the "Independent Printing and Publishing Company" and their staff mean? Three views may possibly be taken of the contract—three, but no more than three.

First, it may be said that it was a contract in which the wages were fixed at 22*s.* a-week. This was the view advanced and insisted on by the plaintiff's counsel.

Secondly, it may be said to be a contract in which the wages

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were fixed at 20*s.* a-week, and that, in consideration of accepting a reduced money wage, an interest in the Company was to be given to the plaintiff: that, in fact, the true wage was the reduced money wage of 20*s.* a-week: and that, in consideration of the reduction, the plaintiff was to get an interest in the Company. In this view the interest in the Company would not be given as a recompense or remuneration for labour or work, but in consideration of an agreement to take the smaller wages of 20*s.* a-week.

The third, the only remaining possible view, is that the agreement was a contract in which the weekly wages were fixed at 20*s.* a-week, plus a tenth part of a share in the Company, the face value of which was £1.

Dealing with the contract on the basis that it fixed the wages at 22*s.* a-week, I am, nevertheless, of opinion that, even on that assumption, the plaintiff is not entitled to recover. He is, by the circumstances of the particular case, precluded from all right to recover. He is estopped from so doing by the nature of the contract he entered into, and by the fact that all parties acted upon and acquiesced in it for years on the faith that each were bound thereby. What would be the result if he were allowed to recover? This—the Company's funds—his co-contractors' share and interest in those funds, including the share and interest in those funds which belonged to those of the staff who were outside the Truck Acts would be made available to pay to the plaintiff the money now claimed by him in breach of his contract with those others—a contract by which they are bound. The relation of employer and employee does not subsist between the plaintiff and his co-contractors, some of whom are outside the Act. The Truck Acts cannot affect their rights, and it would be to sanction a very palpable fraud if we were to allow the plaintiff to recover as against them. He was, without contrivance or pressure of any sort, party to a contract with them; and now, when he seeks, after years of acquiescence, to recover out of funds in which they are interested, he is, in my opinion, precluded and estopped from saying that his contract with them is not a good one.

It is quite true that they are not parties to the process; but it must be always borne in mind that it is out of funds, the moneys of the Company in which they are interested, that he seeks to

recover. We have before us the Company, of which those co-contractors who are outside the Truck Acts are members; and, if we hold that a decree should be given, payment must be made out of the funds in which they are interested as shareholders.

For these reasons, even on the assumption that the wages were fixed at 22*s.* a-week, I am of opinion that the plaintiff must fail.

We are, however, all of opinion that the first view of the contract, that it was a contract in which the wage was fixed at 22*s.* a-week is not the correct view. We are all of opinion that the contract, so far as it related to a money wage, did not exceed the limit of 20*s.* a-week. The original wages were to be reduced to that sum. If the full sum of 22*s.* a-week had continued to be payable, there would have been no reduction; but the new contract, in our opinion, did not operate as a mere mode of discharging a liability of 22*s.* a-week. The agreement operated as a reduction of the money wage, with something additional, namely the tenth part of a share weekly; and it matters not whether the tenth part of the face value of the share is to be regarded as a consideration for the reduction of the wages, and therefore as not coming within the definition of wages in the 25th section of the statute, or as remuneration for labour, and therefore included in that definition.

The provision that what were described as "deductions" were to be credited as subscriptions for ordinary shares has been relied upon both by Mr. Sullivan and Mr. Dunn, in support of the contention they insisted upon throughout—that the wage was a weekly wage of 22*s.*; but, in my opinion, the dominant intention of the resolution, which was the basis of the contract, was "*reduction*" of wages, and the word "*deduction*" was used to represent the money portion of the original wages, which the staff had agreed to forego. The plaintiff was to be dealt with on the basis that he was to get a share interest in the Company: that is to say, the tenth part of the face value of a share in lieu of what he had given up, in lieu of the reduction he had consented to make, namely, 2*s.* a-week. The essence of the transaction was not a mode of payment of portion of a continued wage of 22*s.* a-week, but the creation of a new wage of 20*s.* *and* an interest in the Company, whether the latter—that is, the interest in the Company—

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was, as I have already said, to be regarded as portion of the wages or a consideration for accepting a new reduced wage.

Now, if it be the latter, the whole case is easily solved. The plaintiff would in that case have been paid his entire wages; and an interest in a share given as a consideration for accepting a reduced wage would not be within the definition of wages given in the 25th section of the statute. But, assuming that the share in the Company formed part of the wages, then it follows, I think, clearly, that the plaintiff is not entitled to recover on the question put to us by the learned Judge. That question is "whether the plaintiff is entitled under the provisions of the Truck Act to recover from the defendants the difference between the former and the reduced rate of wages." Agreeing that the wages were 20*s.* a-week, and an interest in a share, what the plaintiff would be entitled to, in addition to the 20*s.* which he got, would be the value of the share, which might be greater or less than the 2*s.* a-week; and, as this value is not ascertained, this question should be answered in the negative.

This view, no doubt, though involving an answer to the plaintiff's claim—and the defendants in this case are abundantly justified in relying on any answer—is founded, more or less, upon the form of the case and upon considerations independent of what the true construction of the Truck Act is.

Assuming the wages to be 20*s.* a-week, and a share or part of a share, how, under the Truck Acts, would the matter be? I am of opinion that the reasons I have assigned as an answer to the plaintiff's claim on the assumption that his wages were 22*s.* a-week, should prevail. If the true view of the contract be that his wages were 20*s.* and one-tenth of a share, the plaintiff, for the reasons I have already given, is precluded and estopped from relying upon the provisions of the statute to avoid the contract.

But, apart from any question of estoppel and acquiescence, how does the case stand if the contract fixed the wages at 20*s.* a-week, *and* the tenth part of a share?

Would that be a case struck at by the Truck Acts? What was the policy and object of these Acts? Lord Herschell tells us, in his judgment in the case of *Hewlett* v. *Allen* (1). He there

(1) [1894] A. C. 383.

says —"I do not think it can be doubted that the object of this enactment was to strike at the practice which had grown up of employers making their payment in part by the supply of goods, in the sale of which they were interested, which it was thought would place the person employed at an unfair disadvantage, and which it was thought was calculated to result in the person employed obtaining something less than the agreed remuneration for services."

This is the language of Lord Herschell. Now a share is not "goods, wares, or merchandise," and the plaintiff in the present case did not get less than what by his contract he agreed to take, viz. 20*s*. a-week, and a tenth part of a share. But the question remains. Is such a form of wage struck at by the Act? Take this case. Wages fixed at 20*s*. a-week and the use of a cottage to live in. Is that case struck at by the Act? One's instincts are startled by such a construction of the statute, but such a case might nevertheless appear to come within the letter of the Act, if not within its spirit. The 1st section of the 1 & 2 Wm. 4, c. 37, which is styled the principal Act, provides that, if "In any such contract the whole or any part of such wages shall be made payable in any manner other than in current coin, such contract shall be illegal, null, and void." And the definition of wages, as given in the 25th section of the Act, includes not only money, but any other thing given as a reward or remuneration for any labour done or to be done. This definition is as wide as it well can be, and its very large comprehensiveness is indicated by the exemptions contained in the 4th section of the Act of 1887, which provides that nothing in the principal Act shall render illegal a contract with a servant in husbandry for giving him, amongst other things, food or a cottage in addition to money wages as remuneration for his services.

But assuming such a contract to be illegal, another question remains. It is this, What is the servant entitled to recover? Is he entitled to recover not only the money wage, but the value of anything given in addition to money wages. In the case I put, Is he entitled to recover, not only the money wage, but the value of the use of a cottage? Now, there is no express provision in the Act of Parliament for valuing anything; but is such a function

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or process impliedly imposed or directed? It, I think, might with some plausibility be contended that once the 1st section commanded, as it were, payment in money—that is to say, the fixing of a money wage and nothing else—the following sections proceeded on the basis that nothing but money wages would be so fixed, and dealt with their payment with a view to money wages being paid in money, and in no other way: for instance, that a wage of 20*s.* a-week, which would be *ex concessis* a lawful wage, should be paid in current coin and not otherwise. No doubt, there is a difficulty created by the definition of the word "wages." "Wages," in the 1st section, would include something in addition to a money wage, and, if in the 3rd and 4th sections the word "wages" was to be construed as a money wage alone, the word in the different sections would bear a different meaning.

However, the words in the 3rd section are the entire "amount" of the wages, and that would certainly, *prima facie*, mean the entire amount of a money wage. The words are not the *amount and value*; and, later on in the 3rd section, the words used are that every payment made in respect of *such wages* "*by delivering goods, or otherwise than in current coin*," is declared illegal. These words would seem to forbid payment by the delivery of goods when a money wage exclusively was fixed.

The 4th section is the important section upon the subject with which I am now dealing, namely, whether the employee can recover at all except where a money wage is fixed. That section provides that the employee may recover any part of wages not paid in current coin, as servants recover their wages.

This section, if taken by itself, would certainly seem to me to contemplate a case where the entire wages consisted of money wages, and where a balance remained undischarged in current coin. It does not seem, at least *prima facie*, to contemplate the valuing of something other than current coin, and awarding this as wages, for instance, valuing the shares in the present case, and awarding their value to the plaintiff as wages; and the 5th section, which deals with a limited set-off, would appear to contemplate a money wage against which there would be strictly speaking a set-off.

Now, I asked counsel for the plaintiff, If the wages were 20*s.* *and* a share, what would be the consequence? The answer was

that the case I put would raise a difficulty, and that it was essential to their case that the wages were 22*s.* a-week, an entire money wage, and not a wage partly money and partly a share.

It may be said that the statute would be entirely frustrated if the employee could only recover the money part of the wage when the entire wage was of a composite character, namely, partly a money wage and partly something else, such as a share, or, the use of a cottage. This is not so, as a composite wage would be hit by the 1st section. What Lord Bowen, in his judgment in *Hewlett* v. *Allen* (1), calls "the offence against the public," would be committed if a composite wage was fixed, and this offence would be penalised by the 9th section of the Act.

However, upon the facts of this particular case, and having regard to the answer that, as I have before indicated, may be given to the plaintiff's claim, on the hypothesis that the wages were of a composite character, namely, of 20*s.* a-week and a share, it is not necessary to come to a final opinion on the question I have been now discussing, though my present impression is that the employee is entitled to recover only where the deduction is from a money wage.

My brother Andrews has suggested a view, which attracts me, but in reference to which I do not think it necessary to give a final opinion. He pointed out to us that the 6th section contemplates that there may be other defences besides the limited character of the set-off dealt with in that section; and he has referred to passages in Lord Bowen's judgment in *Hewlett* v. *Allen* (1), which would indicate that this was so; and he suggests that, this being so, it is only reasonable to hold that, whilst the shares stand in the plaintiff's name, the defendants may set up a defence against a claim for their value, that the plaintiff still holds the very thing he seeks to recover the value of.

This view of the case is certainly plausible, but there is this difficulty. Is it not setting up as a defence the retention of that which the first section prohibits to be given as wages, declaring any contract by which it is agreed to be given as wages to be illegal, null, and void? However, I desire to leave the matter absolutely open as far as I am concerned.

(1) [1892] 2 Q. B. 662.

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As to the point that the plaintiff is barred by lapse of time, I agree with the argument of his counsel. The section of the Act of 1896, upon which the question arises, is expressly confined to cases arising under that Act, and does not extend to cases arising under the principal Act. The separate identity of each Act is distinctly preserved.

On the whole case, however, I am of opinion, for the reasons I have assigned, that the plaintiff is not entitled to succeed, and that the case which has been stated for our determination by our brother Madden must be answered in the negative, the defendants to get the costs of the argument. As I said at the commencement of my judgment, the case is a difficult one, and its difficulty with me was much enhanced by the fact that the learned Recorder of Dublin, for whose opinion and legal attainments I entertain very great respect, arrived at a different conclusion.

ANDREWS, J. :—

The question which Mr. Justice Madden has reserved, namely, whether the plaintiff in this action is entitled to recover, under the provisions of the Truck Act, the difference between his former and reduced rates of payment must, in my opinion, be answered in the negative, for in no view of the case, as I interpret the agreement in question, could he, upon the facts, as stated, be entitled to recover more than the money value of the shares he has received, and this has not been ascertained; but, as the case is one of considerable importance, and it appears that a number of claims depend upon its decision, I shall consider whether apart from all technicality, the plaintiff, upon the facts as stated, is entitled, in any form of action, to recover anything from the defendants, even upon the assumption that the contract between them was for payment of part of his *wages* otherwise than in current coin of the realm.

I shall first dispose briefly of the question upon the limitation of the time within which the proceedings referred to in the 5th section of the Truck Act of 1896 (59 & 60 Vict. c. 44) are to be commenced, and which has long since elapsed.

I think it clear, upon an examination of the whole of that Act—and looking at the necessary construction of the words "this

Act," as contained in its 4th section—that the words, "this Act," in the 5th section, mean the Act of 1896 only, and that this limitation section has, therefore, no application to the present case; but, even if it were to be deemed applicable to cases within the Truck Act of 1831 (1 & 2 Wm. 4, c. 37), I should be unable to hold that its terms included the present case, which, in my opinion, is not one of sums "deducted by, or paid to" the defendants, within the meaning of these words in the 5th section.

Upon the construction of the agreement, as set out in the case, I am of opinion that the rate of the plaintiff's wages theretofore existing was determined, and a new contract at a new and different wage was entered into; and, even assuming (but without deciding) that the weekly crediting under the agreement of the differences between his former wages of 22*s.* per week, and the "reduced" sum of 20*s.* per week, as subscriptions for ordinary shares in the defendant company, is to be regarded as part of his *wages*, what the plaintiff was to receive under the agreement was not 22*s.* per week, paid by 20*s.* and one-tenth of a share in the defendant company, but 20*s.* per week, plus an allocation of one-tenth of such share, according to its face value, which it appears was £1. Now, taking the widest view of it, the mischief against which the Truck Act of 1831 was provided was payment, or part-payment of wages, in such a manner that the person to whom they were payable might thereby get (as he often did by payment, or part-payment, in goods) less in value than what he contracted for as his wages. A contract admitting of such payment is what was intended to be, and is prohibited by the 1st section of the Act of 1831; and I do not regard the present case as coming within the spirit of the Act of 1831, whatever may be said as to its coming within the letter.

I cannot think that it was intended by that Act to make illegal and void a contract for a wage of a specified money amount, with something besides money added, say, for instance, a house or garden, free of rent, or the grazing of a cow. Under such a contract the person employed would receive everything he contracted for, and nothing which could be of less value than what he contracted for as his wages; and, under the contract in the present case, as I interpret it, the plaintiff by receiving 20*s.*

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per week, and a weekly allocation of one-tenth of a share in the defendant company, received everything he contracted for, and nothing which was, or could be, of less value. In the 2nd section of the Act of 1831 the context clearly shows that the "wages" therein referred to are the money wages contracted for, and that what is prohibited is any provision in the contract for laying out or expending them in any particular manner. But, assuming for the sake of argument, and without deciding, that, having regard to the definition of the word "wages" in the 25th section, and to the language of the 1st and 3rd sections, the agreement in question, in so far as it relates to the tenth of the share, must be held to be illegal and void, and that the "payment" (if it can be so called) of the tenth of the share was illegal and void as a payment—the plaintiff's remedy, in my opinion, under the 4th section, would, at the furthest, be to recover the value in current coin of that part of his wages, viz., the tenth of the share which had been contracted to be paid otherwise than in current coin. The 4th section could not mean that his remedy was to recover the actual tenth of the share, for, on the assumption I have made, the contract to pay by it was illegal, and under the contract he would receive the actual tenth of the share as he has done.

Now, in an action by the present plaintiff to recover the value in current coin of the shares he has received and retained, the defendants would have the right, if it has not been taken away, to defend the action, on the ground that the plaintiff has got and retains the very shares for the value of which he sues, and this would obviously be a complete answer to the action. The defendants' right to rely on this defence has not, in my opinion, been taken away. The 5th section of the Act of 1831 only takes away the right of the defendant in such an action to make any set-off, or claim any reduction of the plaintiff's demand, in respect "of any *goods, wares, or merchandise*," had or received by the plaintiff, as, or on account of, his wages, or in reward for his labour. The weekly allocation of the tenth of a share cannot come within this category, nor can the shares in the defendant company ultimately received by the plaintiff. This 5th section, therefore, has not taken away the defendants' right to rely on the defence I have referred to, and it has not been suggested that anything else has taken it away.

It will be observed that, on the assumption on which I have been proceeding, all that is rendered illegal and void, is the *contract* to pay, and the *payment* of part of the plaintiff's wages by the weekly allocation of the tenth of a share in the defendant company. The mere weekly allocation *per se* is a perfectly legal act, and so is the reception of it *per se*. Grant, for argument's sake, that the contract for the allocation, and the part payment of wages by the allocation, were null and void, and that the plaintiff could have refused to be bound by the contract in this respect, and could have insisted on being paid weekly the value of the tenth of the share in current coin, still there is nothing in the Act nor in law, or reason, outside the Act, to prevent him from electing to take and keep the shares, which he did take, and has kept, whereby he has received exactly what he contracted for, and nothing which could be of less value. The weekly allocation was his own proposal, and was made at his own request, and he voluntarily accepted it each week.

The case is free from any suggestion of influence, or pressure by the defendants, and, as I have said, there is no illegality whatever in either the allocation or the reception of the shares *per se*. On the facts I think it clear that the plaintiff must be held to have elected to waive his action (on the assumption that he had one) and keep his shares, and that this also would be a complete answer to an action to recover the money value now.

It will be observed that he has never rejected his shares, nor repudiated, nor sought to return them.

The case of *Hewlett* v. *Allen* (1), though not identical with the present case, affords, in my opinion, valuable guidance for its determination. The decision of the Court of Appeal was affirmed by the House of Lords, and though on different grounds from those which formed the basis of the judgments in the Court of Appeal, these judgments cannot, as I think, be regarded as having been over-ruled. The joint judgment of Bowen, L. J. and Lord Esher, has very instructive comments on the Truck Act of 1831. The learned Lord Justice, in referring (pp. 664, 665) to the provisions which give the right to the workman to recover the arrears of wages not paid in coin, observes that, while the Act prevented

(1) [1892] 2 Q. B. 662; [1894] A. C. 383.

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the employer from setting up in answer to such action *some* rights of set-off, of which he might otherwise at law have availed himself, it still left other rights of set-off available to him. Again, referring to section 5, he said (pp. 667, 668) :—"It will be seen that it extinguishes such right of set-off only in certain cases, leaving rights of legal and equitable set-off untouched in all other instances than those specifically mentioned. . . . The statute draws its line of tutelary shelter here, and a similar though not absolutely identical line is drawn in the Act of 1887. Beyond these lines, all legal and equitable rights of set-off, and all legal and equitable defences, other than payment, are still left open to the employer."

Further on, after saying that the payment in current coin of a portion only, instead of the entire wages may be an offence against the Act (*i.e.* of 1831), he proceeds on these words :—"Yet when the workman sues to recover the unpaid portion, the employer is not precluded in all cases and every case alike from enforcing every set-off, or legal or equitable defence that he possesses, although in respect of certain specified dealings he is deprived of a particular set-off. The offence against the public may well be complete, and the penalty have been incurred, but it does not follow that the employer is to pay the workman the full arrear left unpaid in current coin, where, though not paid in current coin, the claim of the workman has been released, or satisfied in some other lawful way which falls short of being actual payment . . . and facts which establish a right of equitable, as well as legal set-off, will also be available to the employer, if they are outside the set-off forbidden by the Act."

These observations appear to me to have an important bearing upon the relative positions of the plaintiff and the defendants in the present case.

Kay, L.J., agreed in the main with the judgment I have referred to, and said (pp. 674, 675) :—"Particularly I agree that the deduction made in this case [*Hewlett* v. *Allen* (1)] was *prima facie* a deduction contrary to the spirit and the language of the Truck Act, which has been referred to; but in this particular action we have to consider not merely that, but whether the subsequent conduct of the plaintiff in the action has not been such as to

(1) [1892] 2 Q. B. 662; [1894] A. C. 383.

debar her from the remedy which *prima facie* she had to recover the arrears of her wages under the provisions of the Truck Act."

What was in question in the case of *Hewlett* v. *Allen* (1) was a clear deduction weekly from the plaintiff's money wages and the payment of it as a subscription to the funds of a sick and accident club. The House of Lords held this payment to be, upon the facts of that case, payment to the plaintiff within the meaning of the 3rd and 4th sections of the Truck Act of 1831, but it also seems to have been held (p. 392) that, even assuming that there was in that case a contract which was made illegal, null, and void, by the 2nd section of the Act, the defendant, by making the weekly payments to the club, with the assent of the plaintiff, had discharged his obligations to her.

In referring to the object of the Act of 1831, Lord Herschell said (p. 389):—"My Lords, I do not think it can be doubted that the object of this enactment was to strike at the practice which had grown up of employers making their payment in part by the supply of goods in the sale of which they were interested, which it was thought would place the person employed at an unfair disadvantage, and which it was thought was calculated to result in the person employed obtaining something less than the agreed remuneration for his services."

His Lordship also referred to the limited character of the set-off, or reduction of demand which is prohibited by the Act (pages 389, 390), and which I have observed upon.

I do not think it necessary to occupy time in discussing the numerous other authorities to which we were referred during the arguments on both sides, having regard to the guidance which, in my opinion, is afforded by the judgments in the Court of Appeal, and the House of Lords, in a case of so high and so recent authority as that of *Hewlett* v. *Allen* (1), and, although the decision as to the rights of the parties in this case cannot be affected by any considerations outside the law applicable thereto, I may be permitted to add that I regard it as satisfactory that the conclusions at which I have felt justified in arriving on legal grounds are consistent with the manifest justice of this

(1) [1892] 2 Q. B. 662; [1894] A. C. 383.

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particular case, which, as it appears to me, would be lamentably defeated if the plaintiff's contention were to prevail.

GIBSON, J.:—

At first sight this case would seem to be far distant from the mischief dealt with by the Truck Acts, viz. payment of wages in goods, and possible advantage thence derived by the employer at the workman's expense. The staff of a new journal, some of them within the Truck Acts, and some (as counsel admit), like Mr. Allan, the manager of the paper, outside those Acts, in order to save the adventure from shipwreck, and to avoid consequent loss of employment, agree on their own initiative with one another, and with the Company their employers, that all wages should be reduced by a certain percentage, varying according as the wages were under or over £2 a-week (the case erroneously states £3). To mitigate the severity of the sacrifice, and also as an incentive to zeal and exertion, the members of the staff are brought into partnership by getting shares in the paper, which are to be acquired by crediting each member with the amount of reduction he has submitted to as purchase-money of the shares estimated at their full value. To ensure complete unity of action, it was agreed that any employee not assenting to the reduction should be discharged. Does such an arrangement come within the Truck Code?

Before considering whether the Acts apply, we must ascertain, apart from the Truck Code, what is the true meaning of the contract, and what is the real contract wage. The plaintiff's argument proceeds on the view that there was no reduction of wage at all, but only an alteration in the mode of payment, which, so far as relates to the deduction of the percentage and the acquisition of shares, was (it is said) illegal. The defendants' construction is that there was a wholly new rate of wage created; the former wage was reduced; and the employees were to get, by way of additional remuneration, shares which were to be acquired by crediting the amount of reduction as if it was purchase-money. A third view has been suggested by my Lord, viz. that the wage was reduced; that it was the only remuneration, and that the shares were not part of the wage or remuneration for labour, but the consideration for the acceptance of the reduced wage. The

agreement (of which the case only purports to give an extract) does not expressly specify the consideration, which must be collected by inference. The arrangement is expressed in loose and untechnical language. Having regard to the definition of "wages" in section 25 of the principal Act, and to the fact that every composite wage, consisting partly of money and partly of goods, *prima facie* imports that the cash part is reduced in proportion to the estimated value of the goods, I think it best to assume in the plaintiff's favour for the purpose of my decision that the arrangement provided a new remuneration in substitution for the old wage. In any aspect of the case the shares cannot be regarded as a voluntary bonus.

Dealing with the contract as meaning that the plaintiff's wage was not merely of 20*s.* a-week, but comprised something else, I think it is plain that the governing word of the bargain is "reduction." This term the plaintiff's interpretation entirely deletes. No doubt the word "deduction" is also used; but it is manifest that the 2*s.* a-week was never intended to be payable in coin. The percentage of reduction was only used for the purpose of the book-keeping calculation on which the shares were to be allotted. Just as the shares represented a speculative value quite different from the face value, so the 2*s.* credited did not represent real cash. The Truck Code does not alter the contract of employment in its essence, and transform the value or rate of the stipulated remuneration. If the contract was broken, the plaintiff, if not within the Truck Act, could only recover as damages the value of the shares, and not the amount of the deduction. The wage of 22*s.* a-week payable in coin which the plaintiff now claims is quite different from the remuneration bargained for. The plaintiff cannot by the instrumentality of the Truck Acts convert speculative paper into cash, and compel payment on that basis.

If the shares formed part of the recompense of the plaintiff's labour, do the Truck Acts apply to the transaction? and can the plaintiff who holds the shares get payment of their value from the defendants? The authorities cited in argument all relate to cases where, the wages being reckoned in money, the question raised was as to the discharge of such money wage. The application of

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the enactment to remuneration of labour in goods of unascertained value was not before the Court for decision in any of the cases. The terms of the Act of 1831, however, are clear, and require the remuneration of labour to be made in current coin, and not otherwise. The definition of "wages" in section 25, and the language of section 4 of the Amendment Act of 1887 place the matter beyond doubt. It is certain that a wage, wholly or partly consisting of goods of amount and value fixed by the contract of hiring, would be contrary to the statute. Recompense of labour by goods, &c., of uncertain value is equally forbidden. The wage must be reckoned in money and paid in current coin, save in certain excepted cases.

Take the case of an artificer employed at 20*s.* a-week with a free house (a demise at a rent is provided for by section 23), and other advantages of unascertained value, such as a supply of milk, &c.,—If such house and advantages are part of the remuneration of labour, the employer may be guilty of a statutory offence within section 9. He could hardly escape liability by saying that the money was the only wage, and that the employee had agreed to accept a reduced money wage in consideration of the free house, &c. But, though the employer in such case may have committed an offence, it does not follow that he is civilly liable under sect. 4. As Bowen, L.J., points out in *Hewlett* v. *Allen* (1), the civil and criminal provisions of the enactment do not quite cover the same ground. Section 4 enables so much of the wages as shall not have been actually paid in current coin to be recovered. It would seem (like section 5) to deal with wages reckoned in money. It relates apparently to the enforcement of a lawful money wage which the employer has sought to discharge by illegal means. Without straining the language it hardly seems to apply to the recovery of the money value of an illegal wage. There is nothing expressly authorising the Court before which the case may come to convert the unlawful remuneration in kind into payment in coin at a value or price fixed by itself. Can such a power be implied? It may be said that unless there is such power, and unless section 4 can be brought into operation, an employee, whose wage wholly or in part is composed of goods of unascertained value is left without

(1) [1892] 2 Q. B. p. 668.

civil redress for a clear contravention of the Act. This may be so, but a wage in goods of unascertained value is rare—the reported cases supply no example—and the Legislature, whether from oversight or intentionally, may have confined the civil remedy to the grievance of common occurrence, the payment of a money wage in goods, or otherwise than in coin. As the point is of some general importance, I am unwilling, if the case can be disposed of on other grounds, to decide it now. I shall therefore assume (though I by no means decide) that the plaintiff can sue under section 4 for the value of the shares.

This brings me to section 5, which prevents the employer from making or claiming any set-off or reduction in respect of "goods, wares, or merchandise" had or received on account of wages. But for this section it might be hard to argue that there could be a set-off based on an illegal or void contract. That section, however, may be interpreted as conveying, (*a*) that, but for its prohibition, there might have been a valid set-off to the extent of the value of the goods supplied, notwithstanding that there had been a violation of the statute by the employer; (*b*) that in cases lying outside its words, the right of set-off remained unaffected. The section refers to "goods, wares, or merchandise." Section 5 of the Act of 1887 uses only the term "goods." A house would not appear to fall within this language, nor would the phraseology seem to suit shares which are a speculative chose-in-action of fluctuating and uncertain value. The defendants contend that if shares are not "goods," they can defend themselves by an equivalent set-off against a claim by the plaintiff (if he is entitled at all to maintain such claim) for the value of the shares, treated as an unpaid money-wage. The set-off would, like the cause of action, be based on the value, and not on any contract price, the contract being (*ex hypothesi*) illegal and void. This view of the defendants may be sound, but I feel much difficulty in seeing how there can be a set-off founded on a valid implied contract when the express contract is illegal and void. In two material particulars the case before us differs from *Hewlett* v. *Allen* (1). The allotment of shares was here an express part of the contract of hiring, and the shares were the employers'

(1) [1894] A. C. 383.

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own property. There was nothing like payment in coin to third parties, from which payment the masters could derive no benefit. Much of the reasoning of the Law Lords is addressed to these two considerations. That case was decided on the ground that there was no violation of the Truck Act; but Lord Herschell was of opinion that, even if the Act was infringed, the plaintiff was bound by payments made by his employers on his behalf with his assent. The payments could scarcely be included in the terms, "goods, wares, or merchandise," and, if the view of section 5, now contended for, is correct, it is strange that the judgment was not based on the simple ground that, as section 5 did not apply, the defendants were entitled to protect themselves by set-off. So far, however, is this from being the case that the only lord who mentions section 5 is Lord Herschell. He refers to it in a cursory manner, the greater part of his speech being applied to show that the payment was not in any way contrary to the statute. I admit, however, that the argument based on section 5 is plausible. The section, on its face, seems to imply that to an action brought in consequence of violation of the previous sections of the Act, a defence of set-off would have been available if it (the section) had not taken away such defence. On this view, the only question would be, to what extent does the section exclude set-off? I do not think that shares in the defendant company—a form of profit-sharing—could be considered to be such "goods" as the section contemplates. If every set-off is open which is not expressly forbidden by section 5, the defendants can meet, by a set-off, the action so far as it seeks to recover the value of the shares as wages not paid in coin. The point is one of some difficulty, and the tenor of the speeches in the House of Lords suggests doubt whether section 5 can have the very wide scope and effect for which the defendants now contend. The nature of the set-off or credit authorized by section 23 rather tends to rebut the inference that section 5, by implication, permits every set-off which is not thereby expressly forbidden. Whether, however, a set-off is available or not, the decree seems to be plainly wrong. The plaintiff could not in my view of the contract, recover more than the value of the shares. The decree gives him 2*s*. a-week as an unpaid cash-wage. The question

reserved is whether the plaintiff is entitled to that sum; if he is not, the decree is to be reversed. The answer must be negative. The Court cannot ascertain any other sum based on the value of the shares, varying probably from week to week, as it has no materials before it for making any such calculation.

But other difficulties lie in the plaintiff's way, even assuming in his favour his own construction of the arrangement of 1894, and that there is no set-off.

He has accepted shares in the defendant company, and he is, or is entitled to be, on the register in respect of such shares. The transaction is complete, and his ownership cannot be affected by the illegality of the bargain under which he got them. If the employment was with an ordinary partnership, there would be nothing illegal in fixing the remuneration, partly at a fixed cash-wage and partly at a share in profits. Would a money-wage, with a right to a share in the business after certain periods of service, be unlawful? In such a case the employee would become himself one of the employers. A limited company or corporation may be subject to somewhat different considerations; and an employee may conceivably be at liberty to take shares in such company without losing his right to sue or prosecute for a violation of the Truck Act in respect of such shares. Where the dealing is confined to the employer and employee, there is great difficulty in making out that acquiescence, any more than contract, can be a defence. The limited protection given by section 5 of the Act of 1896, in case of acquiescence, is an argument against any such defence being admissible in other cases or generally. In *Hughes* v. *Bonella* (1), however, acquiescence seems to have formed the sole ground of the judgment, though no third interests were involved.

The case for binding the plaintiff by conduct rests mainly on the tripartite character of the arrangement to which the other members of the staff were parties. Some of these latter (as counsel concede) are outside the Truck Acts, and against them the contract was legally binding. It is familiar law that a bargain otherwise invalid may become effectual by the concurrence

(1) 10 *Times* L. R. 197.

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of third parties, and an accord and satisfaction may be validated in the same way. Many examples will be found in the notes to *Cumber* v. *Wane* (1). If the agreement might have been illegal and void between the plaintiff and defendants, if they were the only contracting parties, it does not follow that, after it was acted on, it was void between the plaintiff and his assenting associates. It was certainly valid as between members of the staff like Allen and the defendants. The plaintiff and his co-adventurers having accepted shares, the plaintiff now seeks, to the prejudice of the latter, to seize upon the property preserved by the common sacrifice and general average contribution. In violation of the contract and after the position of his colleague has been altered on the faith of that contract, he puts forward a claim which, if successful, must necessarily reduce the value of the shares. He would wreck the vessel just as it may be entering port. Do the Truck Acts enable such a seemingly unjust and unfair attempt to succeed? The opinion of Bowen, L.J., in *Hewlett* v. *Allen* (2), is that there may be acquiescence precluding civil remedy even where the statute is infringed. Lord Herschell seems to have entertained the same view. In this case, not only was there an agreement with third parties for value, but there has been an allotment of shares on the faith of it. All the contractors got shares in the defendant Company, the employers. Can the plaintiff be allowed to sue the Company, that is, the entire body of shareholders, when the result is to confiscate for his own benefit the fruit of his comrades' labour and sacrifice, and prejudice their rights as shareholders? Unless compelled by authority, I decline to hold that any such violation of a contract, acted on by all concerned for years, can be carried out under the cover of the Truck Acts.

I agree that if the plaintiff is entitled to sue, his remedy is not barred by section 5 of the Act of 1896. That statute relates to prospective contracts, and brings certain new cases within the operation of the Truck legislation. The expression "this Act" throughout refers to the Act of 1896. It must bear this meaning in section 4; section 5 ought to receive the same interpretation.

(1) 2 Smith's L. C., Ed. 1887, p. 366; 1 Str. 426.
(2) [1892] 2 Q. B. 662.

Section 12 does no more than make the previous legislation applicable to the new provisions.

To summarize: I am of opinion that the plaintiff's construction of the contract is erroneous: that the contract, if and so far as it made shares part of the remuneration of the plaintiff's labour, was contrary to the Act; that the plaintiff's remedy (if any) was limited to the value of the shares, and that the decree appealed from cannot be supported, as it gives the plaintiff a rate of wage to which he was not entitled under his contract. I pronounce no final opinion whether the plaintiff can sue under section 4; but, if he can, I have much doubt whether, on the facts of the present case, the defendants can protect themselves by set-off. But, adopting the plaintiff's own interpretation of the contract, I hold that by his conduct he has lost the right to sue.

BOYD, J.:—

The question submitted to the Court for its decision is "whether the plaintiff is entitled, under the provisions of the Truck Act, to recover from the defendants the difference between the *former* and the *reduced* rate of payment." I think this question should be answered in the negative.

Some years prior to 1884 the defendant company had been incorporated as a limited liability company, its staff consisting of several persons, some of whom came within the provisions of the Truck Acts, while others were outside those provisions.

In the year 1894 it became apparent that the company was not a financial success, and that it could not continue its business unless reductions were made in the expenses of the establishment; and this was well known to the staff. Under these circumstances the several persons forming the staff met together and a committee was appointed by them to devise an arrangement whereby they should retain their employment by enabling the company to continue its operations. Accordingly, the committee drew up an agreement for presentation to the company; and this was signed by the majority of the staff, including the plaintiff and others who came within the protection and provisions of the Truck Acts, and by others who did not come within the scope of these Acts. The agreement, so prepared, was furnished by them to the

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company, and was accepted; and the services of the staff were retained on the terms and on the faith of this agreement. So far, as it appears to me, there was no collusion or contrivance by any of the parties to evade the provisions of the Truck Acts; and the agreement was prepared by the staff and accepted by the company in a *bona fide* effort to reduce expenses and to provide employment for the staff.

In my opinion, the cardinal point of this agreement was "a reduction in wages," and it provides that "they (the committee) will recommend the Board that the service of any employee not agreeing to it should be dispensed with."

Prior to this arrangement, the plaintiff was in the receipt of 22*s.* a-week as wages, and under the scale fixed under the agreement these wages were "reduced" to 20*s.* a-week, and the wages of the other employees, as well those who were within the scope of the Truck Acts as those who were not, were similarly reduced. Having provided for the reduction of the wages, the agreement then provided that, in consideration of the employees making such reduction, the deductions should be credited as subscriptions for ordinary shares in the company. In my opinion, these so-called "deductions" formed no part of the wages "made payable." If they were, the agreement as to a "reduction" of wages would be a farce. The deductions were not made from the agreed wages, but from the former wage. The deductions were not to be "made payable" as the Act of 1831 provided, but "to be credited as subscriptions" towards the employees becoming part proprietors of the company.

The employees continued in the employment of the company from October, 1894, to 24th April, 1897, under the terms of the agreement; and, on the latter date, as the case states, "the plaintiff intimated to the defendants that he would not remain on in their employment *at the reduced rate of wages*, and from the 24th April, 1897 until the 24th February, 1899, he was paid at the rate of 22*s.* a-week." Till after he left the employment of the company on the 24th February, 1899, he never repudiated the arrangement made by him and the other employees, and, during the whole of the time he was receiving the reduced wages, he likewise received the scrip for the shares, and retained and still retains the same.

In my opinion, the plaintiff entered into a contract not alone with the defendants, but also with his fellow employees, those within the scope of the Acts as well as those outside the Acts, that, if they accepted reduced wages, so would he; and I think it would be a violation of all principles of law and justice that he should be permitted, after his long acquiescence, now to repudiate his contract. On the faith of his having so contracted he induced others, who cannot avail themselves of his contention in the present case, to alter their position; and it would be a clear fraud on these persons should he be permitted to recover in this action.

I do not think that the arrangement which was made by the employees at their own instance, with their employers, and for their own benefit, comes within the grievances provided against in the Truck Acts.

A. E. R. J.

The plaintiff appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.), and during the argument the original agreement, as signed by the plaintiff, was for the first time produced, the material portion of which is stated in the Lord Chancellor's judgment, p. 309.

Michael J. Dunn, for the appellant:—

Any deductions made from wages, and all payments of wages made otherwise than in current coin are illegal, unless the deductions are such as are mentioned in section 23 of 1 & 2 Wm. 4, c. 37, and are made under an agreement in writing. If parties agree that certain deductions shall be made from wages, such an agreement is not a contract to pay otherwise than in current coin: *Chawner* v. *Cummings* (1). The principle of this decision was affirmed in *Archer* v. *James* (2), though the Judges of the Exchequer Chamber were divided. Deductions for doctors and sick funds are illegal unless there is a written agreement: *Pillar* v. *Llynvi Coal and Iron Company* (3); *Re Morris, Ex parte Cooper* (4). In *Smith* v. *Walton* (5), the plaintiff damaged a piece of cloth, and

(1) 8 Q. B. 311.
(2) 2 B. & S. 61.
(3) L. R. 4 C. P. 752.
(4) 26 Ch. D. 693.
(5) 3 C. P. D. 109.

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the master tried to make him take it in part payment, and that was held illegal. In the present case the plaintiff's wages continued to be 22*s.* a-week, and the 2*s.* a-week was a deduction, and an attempt to pay otherwise than in current coin. *Hewlett* v. *Allen* (1) is distinguishable, because there the entire payment was made in money, but part of it was paid to a sick club, and the remainder to the workmen.

J. O'Mahony, for the defendants :—

We submit that at the date of the agreement, the plaintiff agreed to take a new wage. Instead of 22*s.* a-week, the plaintiff contracted to work for 20*s.* and a *bonus* addition of 2*s.* in shares. In that view the case is not within the Truck Act at all. It was a mode of payment. In *Hughes* v. *Bonella* (2), 4*s.* a-week was deducted from wages, for steam-power supplied to the artificer, and that was held to be valid. Section 5 of 1 & 2 Wm. 4, c. 37, provides that no set-off shall be allowed for goods, wares, or merchandise, but shares in a company are not goods, wares, or merchandise. In *Hewlett* v. *Allen* (1), deductions for a sick and accident club were held to be valid.

Again if a man consents to an act being done, and says that he will offer no opposition to it, though it could not have been lawfully done without his consent, and thereby induces others to do that from which they might have abstained, he cannot afterwards question the legality of the act: *Cairncross* v. *Lorimer* (3). In this case the other employees signed the agreement on the terms that all persons employed by the defendants would do so, and the plaintiff cannot go back on it.

Cur. adv. vult.

June 25.

LORD ASHBOURNE, C. :—

This case came originally before the Recorder some time ago on a process brought by the plaintiff to recover a sum of £12, the balance of a sum for wages, which he claimed against the defendants. The Recorder, having fully considered all the facts of the case, felt himself bound to hold, on the construction of the

(1) [1894] A. C. 383. (2) 10 *Times* Rep. 197. (3) 3 Macq. 827.

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Truck Acts, that the plaintiff had made out his case, and that the defendants were liable. The defendants appealed, and the case came before Madden, J., on appeal, when the question was fully discussed. Madden, J., did not decide the question, but having regard to the importance of the arguments, he thought it right to state a case for the decision of the Queen's Bench Division. In order to explain the position and make my meaning clear, I shall read some of the paragraphs of the case stated—"It appeared in evidence that for some time prior to October, 1894, the plaintiff had been employed by the defendants as journeyman machinist, an occupation of manual labour, at a weekly wage of 22*s.* In that month the defendants found it necessary to reduce their expenditure and, after some negotiations with their staff, the following agreement, which was produced in Court, was drawn up by a committee of the staff and signed by the majority of the staff, including the plaintiff—'The committee agree for themselves and will recommend to their fellow-workers for six months from the 1st of November, a reduction in wages on the basis of 10 per cent. off all wages and salaries of £3 a-week and under, and of 20 per cent. on all salaries over £3, the deductions to be credited as subscriptions for ordinary shares.' Under this agreement the plaintiff was paid 20*s.* at the end of each week, and the remaining 2*s.* was put to his credit in the defendants' books, and from time to time scrip of shares in the defendant Company to the amount of the sums then standing to his credit was delivered to the plaintiff, and accepted by him.

"After the expiration of six months the same arrangement was carried on by mutual consent, though no new agreement was formally drawn up, and the plaintiff continued in the defendants' employment on the same terms down to the 24th April, 1897. On that date the plaintiff intimated to the defendants that he would not remain on in their employment at the reduced rate of wages, and from the 24th April, 1897, until the 24th February, 1899, he was paid at the rate of 22*s.* a-week. On the latter date the plaintiff left his employment of his own motion without giving notice to the defendants.

"During the period from the 1st of November, 1894, until the 24th April, 1897, the difference between the plaintiff's former rate

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of wages and the rate at which he was then paid amounted to £12."

When that case came before the Queen's Bench Division, composed of the Lord Chief Justice, and Andrews, Gibson, and Boyd, JJ., it was fully argued on both sides. The plaintiff contended that the deduction of 2*s.* a-week was illegal under the Truck Acts, and that the payment of wages in shares was a payment under the Truck Acts "otherwise than in coin of the realm," and that the old wage of 22*s.* a-week was still the wage which was to be paid, 20*s.* of it in coin, and the residue in shares. The defendants, on the other hand, put forward an equally strong contention, namely, that the old contract for 22*s.* was gone, and a perfectly new contract was entered into between the parties, namely, an agreement to work for the wages of 20*s.* a-week, while in addition 2*s.* a-week was credited to the plaintiff in shares. The Queen's Bench Division, on the way in which the agreement is stated in the special case, as I have read it, held that it was a new contract, the governing word of which was that there was a *reduction* in the old wage, that it was a new wage that was agreed upon, and that the shares were not given in part payment of a new cash wage, but it was a *bonus* or a consideration for the acceptance of the new wage, and they reversed the decision of the Recorder, and decided in favour of the defendants.

The plaintiff appealed from that decision, and the case was clearly argued before us by Mr. Dunn for the appellant, and Mr. O'Mahony for the respondents. Up to a certain point in the argument, and it had proceeded a considerable way, the impression upon my mind was in favour of the defendants, and I was disposed to think that the agreement as set forth in the case stated was good. Before, however, the argument closed, at the suggestion of Walker, L.J., the original document which contained the agreement was produced, and it was found that it contained terms, and expressions, and provisions, which had to be considered before a decision could be given. The case then stood over to enable the parties to have an opportunity of considering this new aspect of the case. When this document was looked into, it was found that it altered the view of the case very considerably; the governing word "reduction," which was formerly relied on, no longer

appears in the way it was in the case stated, but the word "deduction" occupies a much more prominent position, and must be taken as expressing the recommendation of the committee, which was signed by the parties. The report of the committee states:—"The committee, having fully considered the position and prospects of the paper, are of opinion that rigid economy of every expenditure added to a small proportional reduction in the heavy wages list of the Company up to about June, 1895, will bring the expenditure and income level." It then proceeds:—"The committee think it well that an engagement should be made by which the entire salaried staff should during the next six months take a certain proportion of their salaries in shares of the Company." From the next page it is plain that this proportion of their salaries was looked at as a deduction from the old wage of 22*s.* a-week. The result of this agreement and its construction amounts to this, that the old wage of 22*s.* was not determined, it was continued, but the method of payment was changed, and instead of 22*s.* to be paid at the end of the week, the new stipulation was that 20*s.* only was paid in cash, and the remaining 2*s.* in shares. It is obvious that this presented the case in an entirely new aspect, and strengthened the argument for the plaintiff, while it placed the defendants in much greater difficulty.

The case turns on the construction of the Truck Act of 1831, which was extended to Ireland by the Act of 1887, and that latter Act enlarged the number of employments to which the Truck Acts should apply. There are some sections in that Act that are expressed with a clearness which cannot be ignored. The 1st section of the Act of Wm. 4 (1) provides that "in all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise, and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid,

(1) 1 & 2 Wm. 4, c. 37.

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such contract shall be, and is hereby declared, illegal, null, and void."

It is hardly possible to conceive words of greater stringency. The Act then provides in sect. 3 that "the entire amount of the wages earned by, or payable to, any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by such employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be, and is hereby declared, illegal, null and void." These provisions make the meaning of the Act absolutely clear, that the wages of workmen should be paid in current coin of the realm, and every effort to pay them otherwise is declared to be illegal, null, and void; and considering the clearness of those provisions, and the stringency of the language used in the Act, I have arrived at the conclusion that this agreement was an attempt to pay wages otherwise than in current coin of the realm, and was therefore illegal, null, and void.

Then we have to consider the question—Does that give the plaintiff the right to issue this process in the Recorder's Court for payment of the balance of his wages, although he has been credited with 2*s.* a-week in shares? That is answered by the 4th section, which provides that "Every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful way and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm."

Once we arrived at the conclusion that the old rate of 22*s.* a-week was the plaintiff's wage, and that the only new matter was an agreement not to pay the entire amount in cash, but to pay portion by crediting the plaintiff with shares in the books of the defendants, then the 4th section applies, and the right of the plaintiff to recover the part of his wages not paid in cash is clear. It is worthy of note that a subsequent section of the Act

of Parliament was deemed necessary to provide that payment of wages might be made in bank notes instead of coin, if the artificer consents. It may be that the Legislature was dealing at the time with men who were forced to take part of their wages in food, or other supplies; but "current coin of the realm" is the sole method of payment in the Act of Parliament. Going on these clear words, I am of opinion that this agreement cannot be upheld, being a contract that portion of the plaintiff's wages was to be paid otherwise than in current coin of the realm.

Then it was argued on behalf of the defendants, that, assuming that there was a violation of the Truck Act, there was acquiescence on the part of the plaintiff in this dealing, so that it would be inequitable for the plaintiff to take advantage of the provisions of the Truck Act, and that he was estopped from raising the question. I do not feel myself at liberty to do away with the clear words of the statute, which declares such agreements to be illegal, null, and void, unless I am coerced by authority to do so. The case of *Hewlett* v. *Allen* (1), which came before the Court of Appeal in England, and also before the House of Lords (2), was relied on. I fail to see the analogy between the two cases. There the employer had paid subscriptions again and again to a sick and accident club, with the consent of the employee, and the House of Lords held that such payments were equivalent to payment to the employee herself in current coin of the realm; the greater portion of her wages being paid in coin to the employee herself, and the rest being paid in coin to a club at her request. That is the decision of the House of Lords, consisting of Lord Herschell, Lord Watson, Lord Morris, and Lord Shand. It was, indeed, contended that in the Court of Appeal, Bowen, L.J., gave countenance to the argument that though the Truck Act had been broken, yet the plaintiff had precluded herself by her own conduct, and by her long acquiescence in the payment to the fund of her contributions from recovering them. Great weight must, no doubt, be given to any decision of Lord Bowen's, but his judgment must be taken in connection with the facts before him, and which were entirely distinguishable from those of the present case.

(1) [1892] 2 Q. B. 662. (2) [1894] A. C. 383.

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For these reasons I am of opinion that the appeal should be allowed, and the order of the Recorder should be restored. As to the costs, we must remember that a great part of the costs has been incurred because the case was not presented in the fullest manner in the first instance; and, in my judgment, each party should bear his own costs in the Court below and in this Court.

FITZ GIBBON, L.J. :—

The answer of the Queen's Bench to the question upon the special case stated by Madden, J., on appeal from the Recorder of Dublin, is in the following terms:—That the plaintiff is not entitled under the provisions of the Truck Acts to recover from the defendants the difference between the former and the reduced rate of payment. This difference, which was claimed in the action in which the Recorder gave a decree for £12, was the difference for a certain period between wages at the rate of twenty shillings per week, which were paid to the plaintiff, and wages at the rate of twenty-two shillings per week, which he alleged to have been left unpaid under an agreement, the making of which was admitted, but which was alleged to be void under the Truck Acts. The special case purported to quote the impeached agreement. As so quoted, a question of construction arose whether, during the period covered by the claim, the plaintiff's wages had not been reduced to 20*s.* per week, and we were inclined to sustain the judgment of the Queen's Bench upon this ground. The discussion of the construction of the agreement as quoted occupied a large part of the judgments in the Court below. Fortunately or unfortunately, while the case was at argument here, Walker, L.J., called for the original agreement, and was naturally surprised at being unable to find in it the words which appeared in the case, and on which the argument had so far proceeded. We must now deal with the document itself, the parties having by amendment incorporated it with the special case.

The facts are as follows :—The plaintiff was for a considerable time employed by the defendants as a journeyman machinist, an occupation to which the case finds that the Truck Acts apply. The extension to the plaintiff's trade seems to be made by the Act of 1887. The plaintiff was employed at a weekly wage of 22*s.* and was one

of the large staff who, in their several departments, some within and some outside the Truck Acts, constituted the staff of the Independent Company. That Company was compelled to reduce its expenditure. A committee was formed of the heads of the different departments, to consider the position and prospects of the Company with a view to reducing the expenditure and to enable the Company to carry on its business. The committee presented a report recommending various economies, and also recommending their fellow workers to agree to a graduated reduction of their remuneration. The committee drew up a statement which was to be handed to the head of each department, and the names of those agreeing to it were to be appended. This was afterwards done, and the rights of the parties must now be governed by the signed agreement alone. In order to effect a saving of expenditure the committee recommended, and by signing the document the plaintiff and the other signatories agreed, "that an engagement should be made by which the entire salaried staff should, during the then next six months (afterwards extended), take a certain payment of their salaries in shares of the Company." They agreed that the following proportions of their salaries should be set aside during the six months commencing Monday, November, 19, 1894, (which period was afterwards extended down to the commencement of the action), from all salaries of £1 and under, 5 per cent.; over £1 and under £2 10*s.*, 10 per cent.; and over £2 10*s.* similarly graduated percentages up to 22 per cent. It was a term of the agreement that the entire staff should join in it, and that the services of any employee not agreeing to it should be dispensed with. The deductions from the salaries were treated as made on account of share capital, and were credited as subscriptions for ordinary shares. *This has been done.* No dividends have been earned or paid, but in the case of the plaintiff 10 per cent. upon 22*s.* per week has been credited to him as a subscription to the share capital of the Company, and it is to be assumed that an amount of such share capital equal to the amount of the deduction from his wages claimed in this action is now standing to his credit, under the impeached agreement, in the share ledger of the Company.

The first question is whether this agreement is within the

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prohibition of the Truck Act, 1 & 2 Wm. 4. c. 37, which is an Act, in its title and preamble, to "prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm." Section 1 enacts that "in contracts hereinafter to be made for the performance by any artificer of any labour in any of the trades therein mentioned" (of which the plaintiff's trade is one) "the wages of such artificers shall be made payable in the current coin of this realm only and not otherwise, and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contracts shall be illegal, null, and void."

Upon the document signed by the plaintiff, I cannot doubt, as matter of construction, that his agreed salary or wages continued to be 22*s.* per week, and that the gist of the contract was that 20*s.* only should be paid in the current coin of the realm, and that the remaining 2*s.* per-week, 10 per cent. of the whole, should be set aside, and if or so far as that 10 per cent. was paid at all, it was to be paid or satisfied in or by share capital of equal nominal amount but of uncertain value. I must hold that this was a contract to make that part of the wages payable in a manner other than in current coin, and therefore that it was illegal, null, and void.

The next question is whether this part of the wages can be recovered in this action. Section 3 enacts that the entire amount of the wages earned shall be actually paid to the artificer in the current coin of this realm and not otherwise, and that every payment made in respect of any such wages other than in the current coin aforesaid shall be illegal, null, and void.

If the allotment of the share capital be treated as a payment of wages, as I think it must be, this section makes it void. The shares being credited as fully paid up to the amount of the 10 per cent. upon the wages, and no dividends having been paid, there are no equities to be adjusted, no liabilities to be considered, and no account to be taken in respect of the credits given to the plaintiff in the share ledger. They are void, and it is not necessary to say anything more about them.

Section 4 enacts that every artificer within the Act shall be entitled to recover from his employer, in the manner by law

provided for the recovery of servants' wages, or by any other lawful ways and means, so much of the wages earned by such artificer as shall not have been actually paid to him by such his employer in the current coin of this realm. Section 5 prohibits any set-off or reduction in any such action for wages, by reason or in respect of any goods, wares, or merchandise received by the plaintiff on account of his wages. Section 25 includes in the definition of wages, any money or other thing contracted to be paid, delivered, or given as remuneration for any labour done or to be done. The Truck Act, 1896, legalizes certain deductions, upon prescribed conditions, and prohibits deductions otherwise made, but neither do the prohibitions nor the permissions of that Act apply to the present case, nor can the limitation, section 5, which deals with the recovery of sums deducted or paid contrary to that Act, be applied to this action. Under the provisions of the existing Acts, I can see no answer to the present action for any part of the amount claimed by the plaintiff which is unbarred by the Statutes of Limitation. By admission of the parties it is to be taken that the amount thus recoverable, if anything, is the amount of the Recorder's decree, *i. e.* £12, and if that sum is recoverable, as in our opinion it is, the case directs that the order of the Recorder shall be affirmed with costs, and it will be remitted to Madden, J., to have this done. Under the Civil Bill Acts the plaintiff will be entitled to the costs of the decree and affirmance.

Two other arguments were relied on. First, it was said that the plaintiff's right to recover was barred by acquiescence. Acquiescence is no bar to an action founded on the illegality of the thing acquiesced in. In equity, acquiescence cannot form a defence unless there has been some conduct, or change of circumstances, on the part of one or other or both of the parties, making it in equity fraudulent for the plaintiff to rely upon his legal right, or upon the illegality of any terms to which he has purported unlawfully to agree. The defence of acquiescence here fails both at law and in equity. The authority chiefly relied upon to sustain it was the judgment of Bowen, L.J., in *Hewlett* v. *Allen* (1); but the facts of that case

(1) [1892] 2 Q. B. 662.

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entirely distinguish it from the present, even if the judgment for the defendants is assumed to be validly rested upon acquiescence. The deductions from the wages in that case were paid over to a sick and accident club, in the benefits of which all the employees of the defendants firm participated. That fund was created for the benefit of the plaintiff herself and of others, and it was held by the Court of Appeal that the deductions from the plaintiff's wages had been disposed of with her consent in a manner which she could not impugn after the lapse of years. The benefit fund had been honestly administered; it was a trust fund held upon a trust which was not illegal, though the fund was made up of moneys collected from persons who had made illegal agreements to subscribe to it. It was assumed that the plaintiff's contributions had been long since appropriated to the purposes for which she made them, therefore she was held to have precluded herself by conduct and acquiescence from recalling those contributions. That case affords no authority against the repudiation by the plaintiff in the present case of the illegal contract to give him scrip instead of cash, both scrip and cash being still in the hands, or under the control, of the original parties to the illegal agreement, and there being now nothing which equity can treat as fraudulent, or which requires to be taken into account if the parties are held to their legal rights, or if their illegal contract and acts are treated as null and void.

The House of Lords affirmed the decision in *Hewlett* v. *Allen* (1) upon the simple ground—wholly distinct from acquiescence—that the entire amount of the wages payable to the appellant had been actually paid to her as much as if the current coin of the realm had been placed in her hands, because the amount of the deductions was paid by the employer at her request into the fund to which she authorized their being contributed.

The last point made for the defendants was that the plaintiff could not rely upon the illegality of his agreement nor recover the deductions, because the staff of the defendant Company who joined in the agreement included a number of persons who were not artificers within the Truck Acts, and it was a part of the agree-

(1) [1894] A. C. 383.

ment that any employee, whether within the Truck Acts or not, who declined to join in the arrangement should be dismissed.

This argument might require consideration if any liability had been created or if any rights had arisen which were now at issue between one employee and another, or among the employees *inter se*, or if any consideration for the agreement as between the plaintiff and the defendant Company could be shown to have moved to or from any third party. But as the case stands the argument amounts only to this, the plaintiff made an illegal agreement, being an artificer under the Truck Acts, and a number of other people who were not within the Truck Acts made agreements in the same terms. The consequences of the illegality of the plaintiff's agreement cannot be affected by that circumstance.

I will add that I am not impressed by the observations reflecting upon the moral aspect of the plaintiff's repudiation of his agreement. Such repudiation is involved in every avoidance of an illegal agreement by a party who has purported to bind himself by it. If the plaintiff was held bound by this agreement, every Limited Liability Company that got into difficulties—indeed whether it was in difficulties or not—could put pressure upon the artificers whom it employed to take part of their wages in credits against capital, and if the Truck Acts are justifiable at all, which it is not for us to question, such a mode of payment would not only be within the purview of those Acts, but might also open the door to mischief, and even to fraud, under the Limited Liability Acts.

The question raised before Judge Madden would possibly have been decided by him, if he had seen the agreement. The case could not have been stated in the terms in which it was, nor could the arguments in the Queen's Bench have run the course they did, if the agreement had been before Madden, J., or the Queen's Bench. Both parties must be held equally responsible for all this, and they must abide their own costs of and incidental to the Appeal, both here and below.

WALKER, L.J.:—

I concur with the other members of the Court. I have read the judgment of Fitz Gibbon, L.J., in which I agree. If the argument of the case in this Court had proceeded on the same facts

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that were before the Queen's Bench, the result might have been different. But we have had the original agreement between the plaintiff and defendants produced before us, and that document makes the case assume a different aspect.

As to acquiescence, I do not think that *Hewlett* v. *Allen* (1) applies to the present case. There there was a payment in current coin to a sick and accident club, and the House of Lords held that was the same as a payment to the person employed. The fact that others were brought in and bound by the agreement does not, in my opinion, furnish an answer to the plaintiff's claim, when the agreement itself is illegal in asking the workmen to take payment otherwise than in current coin of the realm.

HOLMES, L.J.:—

The amendment made in the case stated during the hearing of this appeal has deprived the respondent of his strongest arguments, and has taken away the grounds upon which, up to the time when the error in the case was discovered, I was disposed to affirm the decision of the Divisional Court.

While agreeing with the view that the arrangement made between the defendant Company and its servants was not within the mischief contemplated by the Legislature in the enactment of the Truck Acts, and while recognising the unmeritorious character of the plaintiff's demand, I am unable to give any construction but one to the very plain language of the document which forms the foundation of the case. It runs as follows:—"In addition to this, the Committee think it well that an arrangement should be made by which the entire salaried staff should during the next six months take a certain proportion of their salaries in shares of the Company. They agreed for themselves, and decided to recommend to their fellow-workers that the following proportions of the salaries should be set aside during the six months," &c. The proportions are then stated, and the proposal is that such proportions should be credited as subscriptions to ordinary shares in the Company. Is it not clear from this that the salaries were to remain what they had been before—in the plaintiff's case 22*s.* a-week;

(1) [1892] 2 Q. B. 662; [1894] A. C. 383.

but that for the future the workmen were to receive only part of them in cash, and that the remainder should be credited in the books of the Company as against ordinary shares, for which the workmen were to receive scrip certificates? I turn now to the Truck Act of 1831, upon which as extended to Ireland by the Act of 1887 this case is, I think, to be determined. It is unnecessary to have recourse to the definition section—the 25th—to show that the plaintiff's wages were 22*s.* a-week. Without reference to that section it is clear from the terms of the document that the wages were 22*s.* subject to a condition that portion thereof should be discharged otherwise than in current coin of the realm. Payment by an entry in a ledger and the delivery of a scrip certificate is not payment in any kind of coin. But the 1st section of the Act of 1831 declares that, if in a contract of hiring within the Act, the whole or any part of the wages shall be made payable in any manner other than in current coin, such contract shall be illegal, null, and void.

Up to this point there is, I think, no room for doubt; but there is the further question—can the unpaid portion of the wages be now recovered? The contract having been declared illegal, null, and void in the 1st section, the 3rd section declares that every payment made to the workman by the delivery to him of goods or otherwise than in current coin except as afterwards mentioned shall also be illegal, null, and void; while the 4th section gives the workman the right to recover so much of his wages as shall not have been paid to him in current coin.

In the present case no payment in any sense in which payment can be understood has been made by the defendants either to the workman or to anyone else in respect of the portion of his wages sued for, nor can the defendants rely on any set-off in the legal sense of that term. The defendants can only show an entry in a book, the delivery of a scrip certificate, and an agreement to accept the same in part discharge. But the contract is made illegal by the 1st section; and if it were possible to regard the rest of the transaction as a payment, it is made illegal by the 3rd. Payment by a bank-note is a good deal more substantial than payment by a credit entry and a scrip certificate; and yet a contract for payment, or even actual payment thereby, is only

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saved from illegality by the 8th section. Therefore, I fail to see what defence in the nature of payment, set-off, or accord and satisfaction, is open to the defendants. Something may be learned by contrasting this case with *Hewlett* v. *Allen* (1). There it was a term of the hiring that the workman should pay a weekly subscription to a sick and benefit society, proportionate to his weekly wages, which sum had been regularly paid out of the wages by the employers to the treasurer of the fund, and applied in accordance with the trusts attached thereto. It was held by the House of Lords that the subscription to the society, having been paid at the instance of the workman, was a payment to the person employed, as much as if the current coin had been placed in his own hands; and the only difficulty that suggested itself to some of the peers arose under the 2nd section of the statute, which enacted that if in any contract of hiring, any provision should be made directly or indirectly respecting the place where, or the manner in which, or *the person or persons with whom* the whole or part of the wages should be laid out or expended, such contract should be illegal, null, and void. Some of the peers held that the contract was not within this section, while others were of opinion that even if it was, it was the contract, not the payment, that was made illegal. But nothing then determined touches the present case where there was no payment to any person of the portion of the wages sued for. In the Court of Appeal, *Hewlett* v. *Allen* (1), was decided on the ground of acquiescence; but the reasoning of the judgment of Bowen, L.J., was not adopted by the House of Lords, and, moreover, it would not apply to the present case. The acquiescence he relied on was acquiescence in the payment of the contributions and in the expenditure of the fund on the objects of the society. There is nothing similar or parallel to this in the present case. It is not alleged that the defendants lost, or the plaintiff gained, anything by the scrip certificate which is, in my opinion, as illegal and void as the rest of the transaction.

It was suggested in the Divisional Court that the fact that the arrangement was joined in by servants of the defendant

(1) [1892] 2 Q. B. 662.

Company, not within the Truck Acts, makes it inequitable for the plaintiff to take advantage of the provisions of those statutes. I am unable to understand how this can be made a legal ground of defence. In the first place I do not see how these servants have been prejudiced by what has happened. They entered into a legal contract, and they have received all the payments to which they were entitled under it. They cannot recover more for the past; and if they are now dissatisfied with the arrangement, or think that the defendants will be unable to carry it out in the future, they can leave the employment. In the second place, I am of opinion that if on the grounds of public policy a certain kind of transaction is declared illegal in the interests of a particular class, and special rights are given to the members of such class as a result of such illegality, these rights cannot be defeated by reason of other persons having been parties to the arrangement which constituted the illegality.

The only other defence put forward is that the 5th section of the Truck Act, 1896, requires proceedings thereunder to be commenced within six months from the date of the deduction; but I agree with the Divisional Court in holding that this provision is confined to the special deductions by or payments to the employer that are prohibited by that statute, and has no application to the present case.

Solicitor for the plaintiff: *Hanmore.*
Solicitor for the defendants: *Sheridan.*

R. D. M.

Q. B. Div. 1900.
Jan. 19, 31.

GRACEY *v.* BELFAST TRAMWAY COMPANY (1).

(1899. No. 12,395.)

Negligence—Master and servant—Course of employment.

Two servants of the defendant tramway company took two horses out of the defendants' stables to ride them to a neighbouring forge to be shod, and raced the horses furiously along the public road, vying who should get there first. The plaintiff's horse took fright, and the plaintiff was thrown out of her trap and injured. On new trial motion:—

Held, that the defendants were liable for the negligence of their servants, inasmuch as—the first and main purpose of the servants being in the ordinary course of their employment, and for their employers' benefit—the existence of a secondary object—the servants' own amusement—did not exonerate their employers.

New Trial Motion.

This action which was brought to recover damages for negligence was tried before Madden, J., and a common jury of Dublin city on the 29th November, 1899. Two of the defendants' servants, when taking two of the company's horses from the tram-stables to a forge about 600 yards distant, to be shod, galloped at a furious pace along the public road towards the forge, racing who should be first. They overtook the plaintiff (Martha Gracey) and her brother, who were driving in a cart along the road in the same direction, and the plaintiff's horse, taking fright at the noise of the galloping behind them, and the shouts of the riders, bolted and upset the cart, the plaintiff being thrown out and breaking her wrist. At the trial, at the close of the plaintiff's case, counsel for the defendant company asked for a direction on the ground that on the evidence the defendants' servants were acting outside the scope of their employment in racing the tram horses; and declined to go into evidence. His Lordship declined to direct, as he considered that the evidence showed that the defendants'

(1) Before Palles, C.B., and Andrews and Johnson, JJ.

servants were acting within the scope of their authority in taking the horses from the stables to the forge to be shod; that no doubt they were recklessly trying which should get there first; but that this appeared to amount to no more than grossly negligent discharge of their duty; and that it would have been different if the men had taken the horses out for the purpose of riding a race on the public road, in which event the defendants would not have been responsible. The following questions were left to the jury:—1, Were the horses at the time of the occurrence ridden by servants of the company? [Answer, yes.] 2, Were they being ridden from the stables to the forge on the business of the company? [Answer, yes.] The jury assessed the plaintiff's damages at £70, for which amount the learned Judge gave judgment.

Serjeant Dodd, for the defendants, objected to the form of the second question, and suggested that the question should be, "Were the acts complained of done in the course of the employment?" The learned Judge, however, did not put this question to the jury, it seeming to him either to raise the same issue, or to involve the decision by the jury of a question of law.

The defendants now moved to set aside the verdict and judgment on the ground of misdirection, that there was no evidence of negligence on the part of the defendants, and that the acts of their servants were not done by them in the course of their employment, or for a new trial on the ground that the proper questions were not submitted to the jury.

Serjeant Dodd, *Gordon*, *Q.C.*, and *M'Ilroy*, for the defendants.

Hume, *Q.C.*, and *W. H. Brown*, for the plaintiff.

PALLES, C.B.:— Jan. 31.

Two questions have been argued:—(1), Whether there was any evidence of negligence in the defendants' servants; (2), if so, whether the defendants are liable for the acts of their servants. Neither question presents any difficulty to my mind.

As to the first, there was evidence that the defendants' servants rode the horses in an unreasonable manner, which was calculated

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to frighten other horses, and which did frighten the horse that was drawing the vehicle in which the plaintiff was carried, whereby her injuries were sustained. This was an unreasonable, and therefore an unauthorised, use of the highway; and as it caused damage to the plaintiff an action lies.

The second question arises thus:—Two servants of the defendants, in the course of their employment, took out of the stable two of the defendants' horses, for a purpose of their masters, viz. to bring them to the forge to have them shod. There is evidence that the servants, while riding the horses *upon the road to the forge*, for their own amusement ran a race upon the horses towards the forge, and in so doing rode negligently, and thereby caused the damage. Are the masters liable? If we eliminate what has been called "the purpose of running a race," admittedly they would be liable. In such a case, the act of bringing the horses to the forge would undoubtedly have been one in the course of their employment. No doubt in that case the sole purpose for which the act would have been done would have been a purpose of the masters. But the ground of the masters' liability in such a case would not have been based on any such subtlety as that of a single purpose, as distinguished from several purposes, but because the servants would have been doing their masters' business: *Story* v. *Ashton* (1). The act would have been done for the master.

What, then, is the effect of the servants being actuated by the second purpose; that of riding a race? This second purpose was consistent with the first. Although each servant urged the horse he was riding to go faster than the other horse, both were riding to the forge to have the horses shod. The act, then, which caused the injury was an act for the benefit of the masters, but also, I will assume, for the purpose of the servants. So far as the act was for the benefit of the masters, the act of the servants was, in law, that of the masters; and I cannot see that it ceased to be the masters' act because, for another purpose, it was an act of the servants. The act of going was the masters' act; but for their own purpose the servants performed that act more rapidly than they would otherwise have done—that is, in a negligent manner. In other

(1) 10 B. & S. 340.

words, whilst, by reason of the continuance of the masters' purpose the act retains the quality of that of the masters, the servants' own purpose qualifies the manner of doing it, and renders such manner negligent. But this is the very state of facts in which a master is responsible. If the second purpose had been that of a third party; as, for instance, if a third party had asked the servant to carry a parcel for him to the forge, surely its effect could not have been to make the continuing purpose of taking the horses to the forge any less the purpose of the defendants.

As to the cases, all of them are in favour of the plaintiff.

In *Joel* v. *Morrison* (1), the case was dealt with as if the carman's instructions had been to drive only between Burton Crescent Mews and Finchley. The place where the injuries were sustained was in Bishopsgate-street, which was far from either of those places. In that case the rule is thus laid down by Lord Wensleydale:—"If the servants, being on their master's business, take a detour to call upon a friend, the master will be responsible . . . If he (the servant) was going out of his way, against his master's implied command, *when driving on his master's business*, he will make his master liable; but if he was going on a frolic of his own, *without being at all on his master's business*, the master will not be liable." On this summing up the plaintiff there obtained a verdict. That case is infinitely stronger than the present, as there the going to Bishopsgate-street from the ordinary road from Burton Crescent Mews to Finchley, was a purpose of the driver's own; but as the jury thought that the cart was out on the master's business, they treated the driver as actuated by two purposes, one of which undoubtedly was his own. The basis of the case, therefore, is that a servant acting for two purposes, one of which is his master's, and the other his own, renders the master responsible.

Such cases as *Mitchell* v. *Crassweller* (2), and *Story* v. *Ashton* (3), although in each the decision was for the defendant, are in favour of the plaintiff here, as they show the true rule in deviation cases. Cockburn, C. J., in the latter, says:—"I am far from saying that if a servant, while on the master's business, made a deviation for

(1) 6 C. & P. 501. (2) 13 C. B. 237. (3) 10 B. & S. 340.

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his own purposes, the master might not be liable. But in the present case, as in *Mitchell* v. *Crassweller* (1), the servant drove on *an entirely new and independent journey* for his own business, as distinguished from that of his master"; and Mellor, J., says:—"The carman started off in another direction, upon business *having no relation to his master's*. This was . . . an independent journey, and therefore the defendant is not answerable." Lush, J., said:—"The question in these cases is whether the servant was doing his master's business. Here the servant had virtually come home, and went away entirely on his own account."

Whatman v. *Pearson* (2), which was not cited in the argument, but to which Mr. Justice Andrews has since referred me, was a case in which the master's business had not been completed, as it had been in *Story* v. *Ashton* (3). There the defendant was engaged in constructing a sewer, and employed men with horses and carts. Those men were allowed an hour for dinner, but were not permitted to go home and dine, or to leave their horses and carts. One of the men went home, about a quarter of a mile out of the direct line of his work, to his dinner, and left his horse unattended in the street before his door. The horse ran away, and committed damage. It was held that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was. Bovill, C.J., cites with approval the rule laid down by Lord Wensleydale in *Joel* v. *Morrison* (4), and says:—"In the present case, the servant had charge of the horse and cart, and it was through his negligence and want of care, *whilst acting in the course of his employment*, that the accident occurred." In other words, the second purpose, viz. the desire to get his dinner, did not prevent his continuing to act "in the course of his employment," because his charge of the horse and cart as servant had not terminated. Byles, J., says:—"When the defendant's servant left the horse at his own door without any person in charge of it, he was clearly acting within the general scope of his authority to conduct the horse and cart during the day."

(1) 13 C. B. 237.
(2) L. R. 3 C. P. 422.
(3) 10 B. & S. 340.
(4) 6 C. & P. 501.

I might, indeed, have disposed of the whole case in the pithy words of Mr. Justice Madden in his Report:—"I considered that the evidence showed that the defendants' servants were acting within the scope of their authority in taking the horses from the stables to the forge to be shod. No doubt they were recklessly trying which should get there first. But this appeared to amount to no more than grossly negligent discharge of their duty. It would have been different if the men had taken the horses out for the purpose of riding a race on the public road, in which event the defendants would not be responsible." In my opinion the verdict was right, and the motion to enter judgment for the defendants fails.

Andrews, J.:—

I am entirely of the same opinion. The application will be refused with costs.

Palles, C.B.:—

I should state that Mr. Justice Johnson, who heard the arguments, concurs in the judgment I have delivered, and substantially for the reasons there given. He is not responsible for its words; but before I wrote my judgment I was aware of his views, and that they agreed with mine.

Solicitor for plaintiff: *T. M'Kee.*
Solicitor for defendants: *Frank Kerr.*

A. E. R. J.

Appeal.
1901.

Feb. 27.

REDDY *v.* BRODERICK (1).

Employer and Workman—Compensation—Painting and whitewashing—Repair—Scaffolding—Workmen's Compensation Act, 1897—60 & 61 *Vict. c.* 37, *sect.* 7, *sub-sect.* 1.

The word "repair" in sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, may include painting, whitewashing, and dubbing the ceiling and walls of the interior of a building, where the painting and whitewashing is portion of the work necessary to finish the building. "Scaffolding" includes an internal staging arranged with planks resting on the step of a ladder and upon one of the roof principals, in the centre of a room.

The plaintiff was engaged as a labourer at the Royal Barracks, Dublin, assisting in carrying out a contract made with the War Office for the periodic painting of portion of the building. The work consisted of painting, whitewashing and plastering the old canteen block in the Royal Barracks, a building more than 30 feet high. The plaintiff, at the time of the accident, was engaged in dubbing the ceiling to prepare it for whitewashing. To give him access to the ceiling a ladder was placed leaning against one of the walls, and a plank resting on one of the rounds was thrown across the further end, resting upon one of the roof principals in the centre of the room, at such a height as to enable the man to work on the ceiling. The ladder slipped, and the plaintiff fell to the floor, and was injured:—

Held (affirming the decision of the Recorder of Dublin), that the plaintiff was engaged in employment on a building which was being repaired by means of a scaffolding.

Wood v. *Walsh* ([1899] 1 Q. B. 1009) dissented from.

This was an application under the Workmen's Compensation Act, 1897, which was heard before the Recorder of Dublin at Kilmainham Sessions on Friday, the 4th January, 1901. At the time of the accident the applicant was engaged as a labourer at the Royal Barracks, Dublin, assisting in the carrying out a contract made with the War Office, dated 15th June, 1900, which was put in evidence. The work consisted of painting, whitewashing,

(1) In the Court of Appeal before Lord Ashbourne, C., and Fitz Gibbon, and Holmes, L.JJ.

and plastering the old canteen block in the Royal Barracks, which is a two-story building, the ground floor being composed of stores, &c., and the upper story consisting of four rooms, being the canteen, three of which were occupied. In the fourth room, the dimensions of which were 38 feet, by 24 feet, by 18 feet high, from floor to ridge of roof, the walls and ceiling required not merely painting and whitewashing, but a considerable amount of dubbing—or making even by plastering or otherwise—the uneven defects in the walls, &c., which appeared to have been in a defective condition before the work began.

The applicant at the time was engaged in thus preparing the ceiling of this room for whitewashing, and in dubbing it for that purpose. To give him access to the ceiling a ladder was placed leaning against one of the walls, and a plank resting on one of the rounds was thrown against the further end, resting upon one of the roof principals in the centre of the room, at such a height as to enable the man to work on the ceiling. When the ceiling along one wall was finished the structure was shifted, so as to stand against the next wall, and gain access to the ceiling over it. The applicant had been engaged along one of the walls from morning to the dinner hour, and this structure was then shifted to a new position. When the accident occurred he was working as above described at the ceiling; the floor became wet and the ladder slipped out, with the result that the applicant fell to the floor from a height of 12 feet, and was injured. No question was raised as to the extent of the injuries.

The Recorder found as a fact in the present case that the structure was a scaffolding: it was a structure raised perilously high from the ground for the purpose of enabling the workmen to work at the ceiling. The Recorder further found as a fact that the work in which the man was engaged was one of repairing within the Act. He did not hold that the work of painting or whitewashing is *per se* repairing. Merely ornamental or cleansing work of the kind might not be so. He did not give any precise definition of what degree of such work would, and what would not, amount to repairing, but each case should be decided on its own facts, and its own merits.

In this case the work was being done by contract, for what

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was the necessary reparation of the old canteen room at the Royal Barracks. A substantial part of this contract, as appeared by the specification produced, consisted of plastering for the old walls and ceilings. The workmen in this case had not merely to put on paint or whitewash, but to dub the walls. The Recorder awarded compensation of 9*s.* per week, being one-half the proved weekly wages, to continue till further order.

The defendant appealed.

Chambers, for the appellant:—

This is a mixed question of law and fact. The Recorder's duty was to find the facts, and then what the facts amount to is a question of law: *Ferguson* v. *Green* (1); *Maude* v. *Brook* (2). See also the judgment of Lord Brampton in *Hoddinott* v. *Newton* (3).

Painting is not repairing within the meaning of sect. 7, sub-sect. 1 of the Act: *Wood* v. *Walsh* (4). This arrangement was not a scaffolding, which involves the idea of some permanent structure, erected with poles or the like, and cannot consist of a mere temporary structure, such as a plank on a ladder.

O'Mahony, for the respondent, was not called on.

LORD ASHBOURNE, C.:—

The Recorder has so clearly stated the facts, and we have heard the case so fully discussed by Mr. Chambers that we are in a position to pronounce judgment without calling on counsel for the plaintiff. This is a case of an injury to a workman at the Royal Barracks, during his employment on some works carried on there under a contract, which has been stated. It would appear that the man injured was standing on a plank, one end of which was resting on a step of a ladder, and the other end upon one of the roof principals in the centre of the room. That position was occupied by him to enable him to do some work on the ceiling,

(1) [1901] 1 Q. B. 25.
(2) [1900] 1 Q. B 575.
(3) [1901] A. C. 49.
(4) [1899] 1 Q. B. 1009.

cleaning, whitewashing, and dubbing it, and on these facts the Recorder arrived at the conclusion as a fact that the plaintiff was standing on a scaffold, and that he was engaged in repairing the building.

Mr. Chambers admitted that if these findings were to be accepted by us as facts, there was nothing more to say. But he contended that that was not so, and that under the decisions we were entitled to consider these findings as mixed questions of law and fact for ourselves, and though the primary Court was to ascertain the actual facts of the case we were to see that the right inferences were drawn from them. The learned counsel applied himself to the case with all the latitude he could, but when he shook himself free from any estoppel arising from the findings of fact in the Court below he found that his real embarrassment commenced. He put his best foot forward. He contended that cleaning, whitewashing, and dubbing was not "repairing": he urged that point as strongly as possible, and took his stand on *Wood* v. *Walsh* (1). The learned Judges who decided that case were the Judges of the Court of Appeal in England, whose decisions are always to be treated with the greatest respect. But being, as we are, a Court of co-ordinate jurisdiction, we are not necessarily bound by their decisions, and it is our duty to express our own judgment upon any case brought before us. In that case, as in the present one, the decision turned on the question of "scaffolding" and of "repairs." I should have been disposed, for myself, not to concur with the decision on the point of the scaffold, and I am bound to say also, as at present advised, it is difficult to arrive at their conclusion that painting a house was not repairing it. In the case in the House of Lords of *Hoddinott* v. *Newton* (2), so much referred to, I cannot find a single word that fell from any member of the House of Lords that can be tortured into approval of *Wood* v. *Walsh* (1). In the argument in the House of Lords, counsel for the appellant said—"The decision in *Wood* v. *Walsh* (1) where a board, one end of which was tied to a rung of a ladder, and the other rested on a sill was held not to be a scaffolding, even if it were correct, does not apply here." It is obvious that the

(1) [1899] 1 Q. B. 1009. (2) [1901] A. C. 49.

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question about the scaffold is reflected on there in the argument, and there is not a syllable of acquiescence in the general decision.

I pass from *Wood* v. *Walsh* (1), stating that while the decision is to be treated with the greatest respect, as a decision of the Court of Appeal in England, I prefer to express my own independent judgment on the facts of this case, unless I find something in the decision of the House of Lords to bind us: *Hoddinott* v. *Newton* (2) being such a decision, of course binds all the tribunals in the country. It is a decision showing that the House of Lords, not for the first time, but in every case that came before them, took the widest and most untechnical view of the Act. While holding that the Workmen's Compensation Act applied only to employment about a building which is being constructed or repaired by means of a scaffold, they also held—"These words do not confine the employment to the construction or repair of the building as a whole. 'Construction' here includes a case where the building has been constructed and believed to be complete, but having been afterwards thought to be faulty and unstable is being strengthened by the addition of stays or supports. 'Scaffolding' may be external or internal, and includes an internal staging arranged with planks and trestles and without poles." They reversed the decision of the Court of Appeal, and in every single case the House of Lords has shown that its trend of opinion is in favour of a liberal and wide construction of the Act. We are, therefore, to apply our own judgments to the facts found by the Recorder, who did not shut out from our criticism his view of the finding on the facts. Speaking for myself, I should find the same conclusion in fact as the learned Recorder. As to the scaffolding—if a plank placed in the position of the plank in this case is not to be regarded as scaffolding, I do not know what is. In my opinion also the work that was being carried out here fell reasonably within the meaning of repairs. Each case under this Act must be decided on its own facts, and I have no doubt, for the reasons I have given, that the appeal must be dismissed with costs.

(1) [1899] 1 Q. B. 1009. (2) [1901] A. C. 49.

FITZ GIBBON, L.J. :—

Lord Macnaghten, in *Hoddinott's Case* (1), agreed with Lord Brampton and Collins, L.J., in thinking that the question whether a temporary staging is a scaffolding within the meaning of the Act is a mixed question of fact and law, and that when the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and bound, to express an opinion. I therefore intend to express my opinion upon it here.

Our first question is whether the work which was being done in this case was "repairing" within the meaning of the Act? This must be decided by considering what the work was. I can not see that painting *may* not be repairing. But to bring it within the Act, I think it must be something more than mere superficial painting for decoration or preservation; it must amount to *repairing the structure*. I put the case of two adjoining buildings, one of them faced with bricks and the other with stucco, both equally weather-beaten, the jointing of the bricks decayed, and the stucco more or less broken. An identical scaffolding is put up against each. The surface of each requires to be prepared, the one by "pointing" the bricks, the other by making smooth and painting the stucco: surely both are necessary works of repair. If so, how about the wood-work? It cannot be kept in repair without paint, and if it is decayed, it must first be mended and then painted. Can it be contended that painting is not repairing in such cases? Must not "repairing" include *keeping in repair*?

We have here most satisfactory evidence as to what the work was in the detailed contract, and in the specification which gives the quantities of each class of work to be done, under the general description of "Periodical services inside and outside the Royal Barracks"—a mass of buildings over 30 feet in height. The work is divided into two parts—1, "External periodical painting" and 2, "Internal periodical painting." The amount of the contract is £1660 12*s.* 8*d.* The first items are under the heading of "Plasterer." "Scrape to original surface, stop and twice lime-white plastered walls and ceiling. Ditto to unplastered walls."

(1) [1901] A. C. 49.

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Then I find under the head of "Painter"—"Two coats (each coat a different color) including all preparatory washing, stopping, cleaning, and pumicing down." I find as a fact that this work, as a whole, was the periodical repairing which was necessary to maintain the Royal Barracks in tenantable order; both these trades, plasterer and painter, are alike within the Workmen's Compensation Act. Whether a plasterer or a painter had first to "stop" the walls, I hold that the walls were being repaired, and that "repairing" was still going on until the painting was finished. Under such circumstances, with all due respect, I can not agree with Smith, L.J., in *Wood's Case* (1), that "repair does not include painting." On other grounds as well as on this, our decision can not stand with *Wood's Case* (1), because we decide not upon the work which the particular workman who was injured was doing at the time, but upon the work upon which, as a whole, the "undertakers" were employed. If, as a whole, it was repairing work within the Act, every workman who was engaged upon any part of it was within the Act also. The House of Lords, and especially Lord Davey, have made that clear. But on the painting point, I can see no difference between the work which Wood was doing, and that which the plaintiff was doing in the present case.

We are not presuming to differ from the English Court of Appeal without guidance in that direction from the House of Lords. In *Hoddinott's Case* (2) the Court of Appeal was held to "have taken too narrow a view," and, in my opinion, the judgment of the House of Lords in that case disturbed the foundation of *Wood's Case* (1) also, upon the question of painting not being under the circumstances of this case, "repairing" within the meaning of the Act.

The judgments in the House of Lords—and on this point they are unanimous—contain many observations about scaffolding, which go far to decide this case. The Court of Appeal had held that the "scaffolding" must have some "relation to the height of the building," that it must be "capable of being used for the construction or repair of the building as a whole," and the like.

(1) [1899] 1 Q. B. 1009. (2) [1901] A. C. 49.

But all the Lords, and none in clearer terms than Lord Lindley, extend the Act to "anything which can fairly be called a scaffold." In *Hoddinott's Case* (1), the "structure" was "put up for use in the daytime, and removed every evening." "No poles were used in its construction; but the workmen stood upon boards, resting on ledgers, lashed to the iron columns; in order to make the structure stronger, trestles were placed underneath the middle of the scaffold boards, and supported them; the board upon which the deceased stood was about 8 feet from the ground." The essential point, therefore, on which the House of Lords differed from the Court of Appeal, was in holding that a moveable structure like that—"a mere combination of materials to enable a man to get at his work"—might be, and was, a scaffolding within the Act. On that principle also, the decision cannot be reconciled with the decision in *Wood's Case* (2), where ladders only were being used, with the single exception of one plank "used thus: one end rested loose on the sill of a window of the top floor, and the other rested upon the rung of a ladder, and was tied to the ladder; one of the men had been standing on this plank, but the deceased had not." In this case the scaffolding was the same, except that it was inside the house, and that one end of it rested on a joist instead of a window-sill, and that it was not tied. Here, as there, according to the language of the trade—that is, of those who best know what a scaffolding is—this was a "scaffolding." I cannot reconcile a decision that it was not a scaffolding with the language of Lord Brampton in *Hoddinott's Case* (1). He says:—"The line between that which constitutes construction, and that which constitutes repair is often a very fine one, and either may be needed *either* inside or outside a building. Brickwork may become defective, window or door sills may require to be taken down and replaced by new ones, beams supporting ceilings may give way, plastering may fall away from walls, etc., in any part of a building—for most of such works, whether of construction or repair, a scaffold of some kind is necessary. Outside the house, if the work to be done is

(1) [1901] A. C. 49. (2) [1899] 1 Q. B. 1009.

Appeal. 1901. REDDY v. BRODERICK. Fitz Gibbon, L. J.

high up, it might be most convenient to use a tall substantial one; inside in rooms a much smaller one would be all that was required, and that might be constructed in a variety of ways, and of any material or combination of materials suitable for the purposes. The side, height, and mechanism of it would, as a matter of fact, of course, depend upon the position in the building of the place needing construction, reconstruction, or repair, and a variety of circumstances impossible to anticipate, and which, therefore, I will not attempt to describe." A step-ladder, or even a bucket upside down, might come within these wide words, but the learned Lord did not mean to go so far as that. Lord Lindley says: "I cannot say that boards or trestles, even inside a room, may not be a scaffolding." The structure here consisted of a board and a ladder, placed together to serve the purpose of a scaffolding. The structure was shifted while the workman was at his dinner, in order that he might get at his work from it when he returned; it was a temporary make-shift for a scaffolding, it was used as a scaffold, called a scaffold, and it was more dangerous than a more elaborate scaffolding. A workman injured by a fall from such a structure was within the mischief aimed at by the Act, and I hold this to be a scaffold within the purpose and meaning of the Act.

HOLMES, L.J.:—

This case is, I think, too clear to call for any additional observations from me. The Recorder has described succinctly and clearly, 1, the structure on which the workman met with the accident, and, 2, the work in which he was employed.

Applying myself to the facts thus stated, I hold that the first was "scaffolding" and the second, "repairs." The structure is of a kind known in the trade as scaffolding; and outside the trade, I know no other word that would describe it. The same observation applies to "repairs." Indeed the contract, which has been examined by Lord Justice Fitz Gibbon, places this beyond doubt.

As for the case in the English Court of Appeal relied on by the appellant, I am of opinion that the last judgment of the

House of Lords makes it unnecessary for us to reconsider it, even if it involved the decision of questions similar to these now before this Court.

Solicitor for the appellant: *M. Good.*
Solicitor for the respondent: *Philip S. Smith.*

R. D. M.

DENNIS *v.* THE LEINSTER PAPER COMPANY, LIMITED (1).

K. B. Div. 1901. Feb. 12. *Appeal.* Feb. 26, 27.

(1900. No. 14,436.)

Practice—Security for costs—Foreign judgment—Plaintiff resident in America—Satisfactory affidavit of good defence—Judgment obtained without jurisdiction.

The R. B. Iron Co., who carried on business in Massachusetts, had sold goods to the defendants, whose place of business was at Clondalkin, in the county of Dublin, to the amount, as claimed, of £1328. In January, 1900, the defendants sent the vendors a draft for 832 dollars, which the defendants stated had been accepted in accord and satisfaction of the claim. On the 23rd February, 1900, the R. B. Iron Co. assigned the debt to the plaintiff, who resided in New York, in consideration of one dollar. The next day the plaintiff issued a process against the defendants, which he served upon C., the managing director of the defendants, who happened to be in New York. An application by C. to the Court in New York to set aside service of the process was refused, and the plaintiff obtained judgment in the Court in New York. The plaintiff subsequently brought the present action, suing on the foreign judgment. On application by the defendants for security for costs, founded on an affidavit setting forth all the above facts:—

Held (affirming the decision of Kenny, J.), that the defendants had shown a reasonable prospect of establishing a defence to the action, and that security for costs should be given.

SUMMONS for security for costs on the ground that the plaintiff was resident in the State of New York, and out of the jurisdiction of the Court.

(1) Before KENNY, J.

K. B. Div. 1901.

DENNIS v. LEINSTER PAPER CO.

The action was by Oliver P. Dennis of Broadway, New York, on foot of a judgment of the State of New York for a sum in American money equivalent to £1328 14*s.* 9*d.* sterling, against the defendants, who are a limited liability company, having their registered office at Clondalkin, in Ireland. The Rice Barton and Fales Machine and Iron Company of Worcester, Massachusetts, in the year 1898, sold to the defendants a paper making machine, for the price, as claimed, of £1328, and the defendants alleged that, on the 17th of January, 1900, they forwarded to the Rice Barton and Fales Company a draft for 832 dollars, and requested their acceptance of same in full settlement. This draft the defendants alleged had been accepted and cashed, but the Rice Barton and Fales Company denied that this sum was accepted in full settlement of the debt. On the 23rd February, 1900, the Rice Barton and Fales Company assigned to the plaintiff for one dollar all their rights against the defendant Company for the purpose of enabling him to bring proceedings against the defendant Company in the Supreme Court of New York.

W. Hepworth Collins, the Managing Director of the defendant Company, while in New York on the 24th of February, 1900, was served with a summons out of the New York Court in an action in which the plaintiff as such assignee sought to recover the debt of £1329 14*s.* 9*d.* against the defendant Company. W. Hepworth Collins instructed an attorney in New York to apply on his own behalf to the New York Court to have the service set aside, which application was refused by the Court. The case subsequently came on for hearing, there being no appearance for the defendant Company, and judgment was given for the full sum claimed. To resist the present summons for security for costs, the plaintiff filed an affidavit sworn by Walter L. M'Corkle, attorney and counsellor-at-law, practising in the Courts of the State, of New York, and also in the Supreme Court of the United States, to the effect that under the judicial decisions of the highest Courts of the State of New York, and of the United States Supreme Court, the owner of a claim against a debtor can assign same, and such assignment as respects the debtor is absolute, whether made for or without consideration, and no notice of such assignment is required to be given to the original debtor by the assignee in order

to perfect same; and although such notice is sometimes given, it is solely to protect the assignee against a possible payment of the claim by the debtor to the assignor after the assignment; that the Courts of the State have jurisdiction in an action by a resident against a foreign corporation; and that service upon a foreign corporation may be effected by personal service of the summons on the president, treasurer, or secretary, or if the corporation lacks either of these officers, on the officer performing corresponding functions under another name.

Serjeant Dodd (with him *Andrew Todd*), for the defendants:—

There was no service upon the defendant Company of the summons upon which this foreign judgment was founded. The defendant Company knowing nothing of this action, the judgment was given behind its back. The assignment of the debt for a nominal consideration, and the service upon the managing director, who happened to be in New York, were effected with the object of snatching a judgment against a Company not resident within the jurisdiction, and owing no allegiance to the Government of the United States. All the cases in which it was decided that a plaintiff who had recovered a judgment in a foreign tribunal was entitled to come into an Irish Court and throw down his judgment, are based upon the fact that the foreign tribunal had jurisdiction over the subject-matter of the action. Here the defendants have complied with the provisions of Order XXIX., Rule 3, by showing that they have a defence upon the merits. [*Crozat* v. *Brogden* (1); *Rousillon* v. *Rousillon* (2); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (3); *Russell* v. *Smith* (4), and Dicey on the Conflict of Laws, 1896 ed., p. 369, were referred to.]

Chaytor, for the plaintiff:—

A foreign judgment can only be impeached on one or more of three grounds:—1, Want of jurisdiction over the subject-matter; 2, fraud practised on the foreign tribunal; and 3, that the enforcement of the judgment would be contrary to natural justice. A

(1) [1894] 2 Q. B. 30.
(2) 14 Ch. D. 351.
(3) [1894] A. C. 670.
(4) 9 M. & W. 810.

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foreign tribunal has jurisdiction over the procedure it may lay down as necessary to the entering up of a judgment, and not only has the plaintiff shown that the procedure adopted was in conformity with the requirements of the American tribunal, but this Court must assume, from the fact that a judgment was pronounced, that all the essentials to conferring jurisdiction had been complied with.

[He cited *Walker* v. *Atkinson* (1); *Denman* v. *O'Callaghan* (2); *Pemberton* v. *Hughes* (3); *Carrick* v. *Hancock* (4); *Boissière* v. *Brockner* (5); *Scott* v. *Pilkington* (6); *Vanquelin* v. *Bouard* (7); *Bank of Australasia* v. *Nias* (8); *Crawley* v. *Isaacs* (9); *Voinet* v. *Barrett* (10).]

Todd, in reply.

KENNY, J.:—

This is an action by Alfred P. Dennis against a limited liability company having its registered office in this country, viz. the Leinster Paper Company, Limited, and the present application is that the plaintiff shall give security for costs under the provisions of Order XXIX., Rule 1. The application is resisted on the ground that the defendant has not shown by a satisfactory affidavit that he has a defence upon the merits (Order XXIX., Rule 3).

The action is brought to recover the sum of £1328 14*s.* 9*d.* alleged to be due on foot of a judgment of the Supreme Court of the State of New York entered up in the year 1900, by the plaintiff as assignee of the original creditors, the Rice, Barton, and Fales Machine and Iron Company, and if it be a perfectly regular judgment against the defendants, the plaintiff has a right to come here and throw down his judgment, and say that it is binding between the parties, and that the defendants are not entitled to go into any case on the merits. The judgment would not be binding on the defendants if it was entered up without jurisdiction, or if it was obtained by fraud,

(1) [1895] 1 I. R. 246.
(2) 31 Ir. L. T. 141.
(3) [1899] 1 Ch. 781.
(4) 12 T. L. R. 59.
(5) 6 T. L. R. 85.
(6) 2 B. & S. 11.
(7) 15 C. B. (N. S.) 341.
(8) 16 Q. B. 717.
(9) 16 L. T. R. 529.
(10) 55 L. J. (Q. B.) 39.

or if it was contrary to natural justice that such judgment should be enforced—that is, if the procedure was contrary to natural justice.

As I understand the defendants' case, as stated by Serjeant Dodd, they object to this judgment on these three grounds, the main ground being that the New York Supreme Court had no jurisdiction. So far as the merits are concerned, it is suggested that there was a good defence to the claim, inasmuch as in the month of January, 1900, a draft for the sum of 832 dollars had been sent to the Rice, Barton, and Fales Machine and Iron Company, who were the manufacturers of this machine, and who carrried on business in Massachusetts, and that that draft was retained by them in satisfaction of the debt in respect of which this assignee, Dennis, subsequently brought the action in New York. I do not go into that, and it is not a question that arises on the present application. They also allege that they have a counter-claim, but any argument founded on that has not been much pressed.

Now what is the rule that governs the Court in considering applications for security for costs, when it is alleged that the affidavit of merits is insufficient? It is laid down in *Walker* v. *Atkinson* (1). There, an application had been made for security for costs before the Master of the Rolls, and he had held that the affidavit was insufficient, and the Lord Chancellor and the other members of the Court of Appeal stated very clearly indeed what should be the nature of the affidavit on which the Court would grant an order for security for costs at the instance of the defendant. The Lord Chancellor says at page 249, "He (the Master of the Rolls), has held that the affidavit of the defendant is not one satisfactory within the meaning of the rule. It is not necessary on an application of this kind that the defendant should make in proof a defence to the action; but as he is bound to lay before the Court a 'satisfactory' affidavit, I think he must at least state the facts which *suggest* some defence. I am unable to gather from the affidavit any facts which state or suggest a defence to the action." Lord Justice Fitz Gibbon says, "It appears to me, that when a defendant applies for security for

(1) [1895] 1 I. R. 246.

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costs, he must not merely swear that he has a defence on the merits—for that was the old requirement—but he must give some evidence to satisfy the Court that there is a *reasonable prospect* of his establishing some more or less specific or ascertainable defence." And Lord Justice Barry says, "I think that in the Exchequer case of *Shepperd* v. *Beamish* (1), which was relied on by Mr. Harrison, a further examination of the case would show that the marginal note goes too far, because it says that it is enough if there is sufficient stated in the affidavit so as to leave the Court to infer that there may be a defence. I do not think that the case goes so far as that." All that I have to be satisfied with on the present application is that there is sufficient matter in the affidavit on which the application is moved, to satisfy me that there is a reasonable prospect of a defence being established. The defendant is not bound to now prove that defence, but the affidavit must be a satisfactory one in the sense that it must state the facts which suggest some defence. Does it do that?

When Mr. Chaytor's client instituted this proceeding in New York, Mr. Collins, the Managing Director of the defendant Company, happened to be in New York. The original cause of action was one that arose between the Rice, Barton & Fales Machine and Iron Company of Worcester, Massachusetts, and the defendant. It was undoubtedly a cause of action that did not arise in the State of New York. But in order that the practice and procedure of the State of New York might attach, the Massachusetts Company assigned, for the consideration of one dollar, their cause of action to the plaintiff, Mr. Dennis, and it is candidly admitted that Mr. Dennis is suing here only on behalf of, and as trustee for, the Massachusetts Company, and that he has become such trustee and representative of them for the sake of attaching the jurisdiction, procedure, and practice of the State of New York.

Finding Mr. Collins in New York, the plaintiff caused him to be served with a summons to appear before the Supreme Court. After being served with the summons—and that was the only

(1) 8 Ir. C. L. R. App. lix.

summons served on anyone—what he did was this—Mr. William T. Carlisle, attorney, served notice of motion to set aside that service, and the notice of motion stated that Mr. Carlisle appeared only for Mr. Collins, and in the affidavit that Mr. Collins made he states this—"This deponent further says that he is not the attorney for the defendants herein, and that he does not appear as attorney for the defendants herein." These affidavits came before the Judge, and I think that the question of entertaining a cause of action that did not arise in the State of New York was evidently before him—and he held upon these affidavits that the service was good, and that the Company was bound. Well, except that service, there was none upon the Company, and I would not take it upon myself in that state of things, and having regard to the statements in the affidavits, to say that that is a judgment that is absolutely binding upon the Company.

No service was effected upon them otherwise than upon Mr. Collins, and it was effected upon him under the section which is referred to in the affidavit of the American lawyer, who refers to the amended law of 1877, as to how personal service may be effected upon a foreign corporation. He says that it may be effected "by delivering a copy within the State of New York as follows—1. To the President, Treasurer, or Secretary, or if the corporation lacks either of these officers, to the officer performing corresponding functions under another name." I would infer from the opinion that such service may be effected even where, as in the present case, the cause of action does not arise within the State.

Apparently the Supreme Court held that Mr. Collins did represent either President or Treasurer or Secretary, and they held the service to be good. But the corporation did not appear before the Court in New York, and I do not think I would be justified on an application such as this in deciding that there is no plausible defence appearing from the facts. On the contrary, I think that a defence is suggested.

The plaintiffs are, I presume, substantial people in the United States, and they will have no difficulty in complying with an order to give security for costs. Accordingly, under the circumstances

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of the case, I think that on the authority of *Walker* v. *Atkinson* (1), the order ought to be made.

J. L.

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The plaintiff appealed (2).

Ronan, *Q.C.*, and *Chaytor*, for the appellant.

[In addition to the cases cited in the Court below, they referred to *Pope* v. *Terra Haute C. & M. Co.* (3)].

Serjeant Dodd and *A. Todd*, for the respondents, were not called on.

LORD ASHBOURNE, C.:—

This case has been so fully and so clearly argued by Mr. Ronan and Mr. Chaytor, and we have had such abundant opportunity of considering it, since the adjournment yesterday, that we do not require further discussion. This is a case in which an application was made by the defendants, who reside in Ireland, against the plaintiff, who resides in America, to give security for costs before he can avail himself of the procedure of our Courts. When it came before the Court of first instance, Kenny, J., after full deliberation, in the exercise of his discretion, arrived at the conclusion that it was a demand to which he ought to accede, and that the plaintiff, resident in America, should give security for costs before suing one of the king's subjects in our Courts.

The plaintiff, not being satisfied with that order, has appealed to this Court. The Court of Appeal is very slow to review, much more to set aside, an order made by a Judge of the Court below in the exercise of his discretion, unless we are satisfied that there was a miscarriage of justice, or some serious misconception of law or fact. We are not now to consider what are the merits of the

(1) [1895] 1 I. R. 246.

(2) In the Court of Appeal before LORD ASHBOURNE, C., and FITZGIBBON and HOLMES, L.JJ.

(3) 87 New York Rep. 137.

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action, or whether there is a valid defence; we have only to be satisfied on the facts disclosed in the affidavits that there is a reasonable prospect of a defence being established. The circumstances are somewhat peculiar. It appears that a firm resident in the State of Massachusetts had a claim against a firm resident at Clondalkin, and the strange thing is that the judgment was recovered at a place where neither of these parties resided, namely in New York. The plaintiff now sues in this country on that judgment, and seeks to have the defendants estopped from going into, or controverting, the grounds on which that judgment was recovered. All that the defendants ask is that the plaintiff should give security for costs, when he is resident out of the jurisdiction, and has not any property in this country available to pay the costs, if he fails.

The residence of both parties being out of the State of New York, *prima facie*, one would say it would be very difficult for the Court in New York to pronounce a judgment, from want of jurisdiction. But the plaintiff Company found a man, named Dennis, who lived in New York, to whom they assigned the debt, in consideration of one dollar, to enable him to sue in the State of New York this Irish Company, who happened to have at the time their managing director travelling in New York. Whether that was the sole reason for assigning the debt to Dennis, I do not know, but the defendants say that this method was adopted for the purpose of attracting the jurisdiction of the Court in New York so as to enable the plaintiff to obtain this judgment. I express no opinion as to what will be the result, when the case comes to be decided. I confine myself to stating that on the facts as disclosed in the argument and correspondence I am not prepared to say that the defendants have not made out a case that a good defence may be established. Kenny, J., on full consideration arrived at that conclusion, and I see no reason to differ from him, and, in my opinion, his judgment should be affirmed, and the appeal should be dismissed with costs.

FITZ GIBBON, L. J.:—

I concur. I see no reason to differ from the exercise of his discretion by Kenny, J. He had only to determine whether the

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defendants' affidavit that they had a defence on the merits was "satisfactory," and upon such a point the opinion of the primary Court ought to be almost, if not quite, conclusive. Upon motions for final judgment, we have over and over again said that we ought not to differ, except upon some point of principle, from the opinion of the Court below, where it has refused judgment, holding that there is a reasonable prospect of a defence being made to the action. The reasons for this course apply with even greater force to such a case as this, where, in the exercise of his discretion, a Judge of the King's Bench Division has thought the defendants' affidavit of merits so far satisfactory that security for costs ought to be given by a foreign plaintiff.

But I do not rest my decision merely on that of Kenny, J. I approve of his decision. Does this affidavit satisfy two requirements? First, does it show that the defendants honestly desire and intend to defend the action on the merits? Secondly, does it specify a defence, and show that there is a reasonable prospect of the defendants being able to sustain it by sufficient evidence? We are not to decide the action on this motion. We cannot reverse the order of Kenny, J., unless we decide, as matter of law and fact, that both these questions should be answered in the negative. Therefore a reversal would amount to a decision that there is no possible, or at least probable, defence, but in sustaining the order, we decide only that it is a reasonable condition of allowing the plaintiff, who lives out of the jurisdiction, to proceed in our Courts, that he should give some security for the costs of the action if he fails. If he succeeds he loses nothing. If he fails, the defendant can not recover his costs unless security is given. Requiring security is a reasonable protection for the defendant, as a subject of our own country.

I do not recede from the position that the defendant must indicate a definite defence, and show a reasonable prospect of sustaining it. What is the defence here? It must be a defence on the merits, and capable of being put into the form of a plea. Here I think there are two pleas indicated—(1) That the Court of the State of New York had no jurisdiction to pronounce the judgment, and (2) That the judgment is not a regular judgment. Upon both these issues, the burden of proof lies on the plaintiff.

As to the first—no Court can confer jurisdiction on itself merely by deciding wrongly that it has it. The question whether the foreign Court had jurisdiction must be decided by the Court in which the foreign judgment is sued upon. I test this question, in this instance, by putting a case. Suppose a small Republic passed an Act of Parliament in these terms—"Be it enacted that the High Court of Monaco shall have jurisdiction to try and determine all causes of action arising anywhere throughout the world, between subjects of whatever states, provided that the alleged claims are assigned for a nominal consideration to a subject of this Republic, in order that he may sue thereon as attorney for the claimant—Court fees 10 per cent. on the amount recovered." All that it is necessary to say now is that, in my opinion, there is at least a reasonable prospect that it might be successfully argued in the Court of any foreign country, and certainly in any British Court, that such an enactment could not bind foreigners, and that the comity of nations, and of Courts, would not extend to estop a foreigner from showing, in his own country, that he had a defence upon the merits against a claim upon which a Monaco judgment had been recovered against him in default of appearance.

In this case a judgment for about £1300 of our money has been recovered in New York by a gentleman who had assigned to him, in consideration of one dollar, all claims and causes of action generally, and by the terms of the assignment he is only authorised to sue and recover as attorney for the assignors. The debt recovered is not specifically assigned at all; the assignment is of "All and every claim, demand, action, or cause of action whatsoever . . . against the Leinster Paper Company, Limited." Is there no reasonable prospect that it may be shown that, according to the law of the State of New York, such an assignment is inoperative, or that, according to our law, it is against "natural justice, or void as based on a 'pretenced title'"? Here it required an Act of Parliament to make debts assignable, and I have failed to find, among the cases cited, or anywhere else, an instance of a vague general assignment such as this. Furthermore, I have failed to find any instance in which the foreign Court which rendered the judgment which was sued upon in our country, had not had cognizance of the original action, either through the cause of action

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having arisen within its jurisdiction, or through the legal and beneficial party to the claim being a suitor in a Court of his own country to enforce his own rights.

As regards procedure—on the question whether there was good substituted service—if the case turned on that, I should be much impressed in favour of the service by the affidavits and correspondence. The managing director was in New York, one of the defendants' letters said that he, when he visited America, would deal with the claim, and while there he was served with a process. Had he been so served by the original parties to the transaction, or in their country, I should have thought the case to be very like *Sheehy* v. *Professional Life Assurance Company* (1). Even there, it took long litigation to sustain the judgment, and security for costs might fairly be required even if the same question was to be re-agitated here. But this case is a long way off that; here a foreign judgment and foreign law are at issue. There an English Court was dealing with an Irish judgment rendered under English law. Here there was no cause of action *prima facie* within the jurisdiction of New York, and the original parties were both outside the jurisdiction of that State. The original cause of action here arose either in Ireland or in Massachusetts, and to that cause of action there is ample evidence of a defence on the merits. From the point of view of the Court of New York, it was a cause of action between two foreigners. The assignment to the New Yorker plaintiff showed him to be suing merely as the attorney of a foreigner, and he was suing a foreign Company, one of whose directors was caught and served in New York within twenty-four hours after the assignment had been executed manifestly for the purpose of trying to snap a judgment against his Company. It would be strange if a person could come over to this country, and, by throwing down such a judgment, could estop the defendant Company from going into the merits of a defence.

But to decide this appeal, I have now to say, *only*, that in my opinion this plaintiff has been most reasonably required by Kenny, J., to give security for costs.

(1) 3 C. B. (N. S.) 597.

HOLMES, L.J.:—

If there is any case in which an appellate Court ought to be cautious in dealing with an order of a Court of First Instance, it is where it directs a litigant to give security for costs. The grounds on which discretion ought to be exercised on such applications are so well understood by the Judges who are in the habit of hearing them, that it would be presumptuous to interfere with these orders unless where it is shown that there has been some error in legal principle.

From an early stage of the argument, it seemed to me that the appeal must fail. It is, I think, quite clear that the plaintiff could not carry a motion for judgment. There are questions involved in the case which ought not to be decided in that summary manner. I agree, however, with what has been said in this Court on a former occasion, that this is not always a test in applications for security for costs. The order for judgment ends the action; but an order on the plaintiff to give security for costs does not prevent him from proceeding with it. Here, however, there is much more than a mere suggestion of a defence. The defendant has one or two grounds for disputing the jurisdiction of the American Court, which are well worthy of full discussion; and as Mr. Justice Kenny thought the foreign plaintiff ought to secure the costs of the discussion, I cannot differ from him.

I prefer not to refer more minutely to the questions that may arise at the trial. I could not do so without indicating an opinion upon them, and it is better to leave everyone, including myself, who may have to decide them hereafter, at liberty to form a perfectly independent judgment.

Solicitors for plaintiff: *Montgomery & Chaytor.*
Solicitor for defendants: *J. J. O'Meara.*

R. D. M.

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1900.
Dec. 12.

HAIG & HAIG *v.* MAC MAHON (1).

(1900. No. 14,855.)

Practice—Writ of summons—Irregularity—Writ indorsed with claim in contract for less than £20 (both parties residing within the same civil bill jurisdiction), and £1 5s. for costs—R. S. C. (1891) *Order III., Rule 7; Order LXV., Rules 3, 4.*

It is not an irregularity in a writ of summons claiming in contract a sum less than £20 to add a claim for half costs (£1 5*s.*) even where the parties reside within the same civil bill jurisdiction.

MOTION to set aside the writ of summons in the action on the ground that the writ of summons, which was for an amount less than £20, claimed £1 5*s.* for costs, whereas no costs were payable by the defendant to the plaintiff in respect thereof, the parties residing in the same civil bill jurisdiction, viz. the city of Dublin.

The writ of summons was specially endorsed with a claim for £19 1*s.* 1*d.*, for goods (whiskey) sold and delivered by the plaintiffs to the defendant and for revenue duty paid by the plaintiffs for the defendant, and claimed £1 5*s.* for costs. In the affidavit grounding the motion, the defendant admitted liability to the extent of £18 11*s.* 1*d.*, and, on the motion, counsel for the plaintiff admitted that both parties had a residence within the jurisdiction of the Recorder of Dublin.

E. Cuming, for the defendant:—

The action could have been brought in the Recorder's Court, and the plaintiff is not entitled to any costs: Order LXV., Rule 4; and the provisions in Order III., Rule 7, only apply in cases where the plaintiff is legally entitled to claim costs, and cannot be supposed to give him a right to costs which Order LXV. denies to him. The provision in Order III., Rule 7, that the defendant may

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

ask to have the costs taxed cannot affect the matter, nor can the possibility of half costs being at a future time awarded on application to the Court or a Judge under Order LXV., Rule 4. Until such order is obtained the plaintiff has no right to any costs whatever in a case such as the present. The endorsement of a claim for half-costs was, in effect, an attempt to force the defendant to pay money which he was not liable to pay. The writ is therefore irregular and should be set aside.

[He cited: *Harbison* v. *M'Larnon* (1); *Jacobs* v. *Monck* (2); *Roberts* v. *Casey* (3) and *Bradley* v. *Kelly* (4)].

H. Wilson, for the plaintiff, was not called upon.

PALLES, C. B. :—

We cannot hold this to be an irregularity unless it is shown that either one of the Rules of Court or the *cursus curiæ* has not been complied with. In all the cases decided up to the present, upon an objection of this class with the exception of *Bradley* v. *Kelly* (4), the Rules of Court had been violated; and, in *Bradley* v. *Kelly* (4) the application was refused. We are therefore asked now to make a new departure, and to set aside a writ of summons, which complies with all the Rules of Court. We cannot do that. Possibly, Order III., Rule 7, might be improved, but, in this particular case, the plaintiff *may* be entitled to recover half costs, because jurisdiction is given to the Court or a Judge to make an order to that effect; and we cannot know whether, under the circumstances which may be brought before the Court or a Judge, such an order may not be made in the present case, and to enable the application to be made, the writ should be framed as it has been. Order III., Rule 7, contemplates cases in which the plaintiff cannot recover *in any event* more than the amount of costs there specified, and this amount *must* be then stated in the writ. It does not say that, where, *in a particular event*, the plaintiff *may* be entitled to a certain sum for costs, he may not set out that amount in the writ. In fact the Rule directs him to state in such a case as this, the

(1) [1894] 2 I. R. 682.
(2) 12 L. R. Ir. 373.
(3) 22 Ir. L. T. R. 8.
(4) Ex. Div., Oct. 14, 1890, before Holmes, J., sitting as vacation Judge. Noted in Henry on Costs, p. 3.

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amount of the costs at £1 5s. and it is here sought to qualify this Rule by making it applicable only to cases outside Order LXV., Rule 4. The answer is, that Rule 4 does not bring the case outside Order III., Rule 7, absolutely. Its application is conditional on the particular order not being made, a matter which cannot be known when the writ is being issued, and which therefore cannot affect its form. This application should be refused. We shall not give costs.

Solicitor for the defendant: *C. O'Rorke.*
Solicitor for the plaintiff: *J. W. Killeen.*

J. H. P.

Q. B. Div. 1900. Dec. 12.

REG. (OATES) *v.* CHAIRMAN AND JUSTICES OF COUNTY SLIGO (1).

Licensing law—Interim transfer—Transfer by interim transferee—18 & 19 *Vict. c.* 114, *sect.* 1.

An "interim" transferee of an excise licence is a person "duly licensed" within 18 & 19 Vict. c. 114, sect. 1; and an assignee of his interest in the licence is entitled to apply at the ensuing annual licencing sessions for a confirmation of such licence.

CERTIORARI:

This was a motion to discharge a conditional order, dated 12th November, 1900, for a writ of *certiorari* directed to the respondent Justices to remove and quash an order refusing the prosecutor's application for a confirmation of the transfer to her of a publican's licence in respect of certain premises in the town of Sligo, on the ground of want and excess of jurisdiction, and that the refusal was grounded upon no due or legal objection, and for a writ of *mandamus* to enter continuances and to rehear, &c.

(1) Before PALLES, C. B., and ANDREWS and JOHNSON, JJ.

It appeared that, prior to the 17th October, 1899, the licensed premises in question were held by one John M'Nulty, who, by indenture of that date, assigned them to one David Clancy. It was then too late to apply for a transfer, or confirmation of any transfer, at the Michaelmas Quarter Sessions (Annual Licensing Sessions) of 1899; but an "interim" transfer was granted to David Clancy at the January Quarter Sessions, 1900. Clancy meanwhile had entered into negotiations with the present applicant and her husband for the sale to them of these licensed premises, and this sale had been completed by indenture dated the 30th of October, 1899, by which the premises and licence were assigned to the applicant's husband; and an interim transfer to him was granted at Quarter Sessions on the 23rd January, 1900. The purchase money being the applicant's separate estate, and the assignment to the husband having been taken under the apprehension that a married woman could not hold an excise licence, the applicant's husband subsequently assigned the premises and licence to her, and, at the June Sessions, 1900, an interim transfer was granted to her as such assignee.

When, at the October General Annual Licensing Sessions, 1900, for Sligo, this last transfer, and the earlier ones, came on for confirmation, a majority of the Justices present (the chairman being amongst the dissentients) refused *in limine* to entertain the application for a confirmation of the licence, "owing to the original transferee not having his licence confirmed before transferring same."

Morphy, for the Justices:—

The question is whether the assignee, or transferee, of an excise licence from an "interim" transferee of same, can have the transfer to him confirmed at the Annual Licensing Sessions following, under 18 & 19 Vict. c. 114, section 1—whether (that is) an interim transferee is a person "*duly licensed*" within that section. As to this, the Crown would desire that a uniform practice should be established throughout the country. The view taken by the Justices is that put forward in 1895 by the learned County Court Judge of county Donegal, in *Langan's Case* (1), and

(1) 29 Ir. L. T. R. 100.

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF Co. SLIGO.

since followed on many occasions, though not uniformly, at Quarter Sessions. The point was raised in this Court on an *ex parte* application for *certiorari* in *Rey.* (*Murphy*) v. *Justices of Donegal* (1); and there the Court disapproved of Judge Webb's view.

Fetherstonhaugh, Q. C., and *Powell*, for the prosecutor, were not called on.

PALLES, C. B. :—

We are all of opinion that this is a plain case, and that Clancy, at the date of the transfer by him, was a person duly licensed within section 1 of 18 & 19 Vict. c. 114. If we were to hold otherwise, it would be impossible that any public-house could be transferred, or sold, twice within the same twelve months. The cause shown must be disallowed, and the conditional order for *certiorari* and *mandamus* made absolute.

Solicitor for the Justices: *Sir P. Coll.*

Solicitor for the prosecutor: *James Fitzgerald.*

J. H. P.

(1) 1 Ir. W. R. 178.

REG. (O'SULLIVAN AND CURTIN) *v.* RURAL DISTRICT COUNCIL OF MALLOW (1).

Q. B. Div. 1900.

May 3, 4.

Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37)—*Local Government (Procedure of Councils) Order*, 30*th January*, 1899—*Maintenance of roads, &c.*

In regard to maintenance works (roads, &c.) the policy of the Local Government (Ireland) Act, 1898, is that, where possible, such works should be executed not directly by the local authority, or under the county surveyor, but by contract; and it is the duty of the local authority to open and duly consider all tenders received in respect of proposals formulated by them.

It is incumbent on persons tendering for such maintenance-contracts to satisfy the local authority as to the sufficiency of the proposed guarantors (as required by Article 18 of the Local Government (Procedure of Councils) Order of 30th January, 1899, and of such guarantors' willingness to give the necessary security.

MANDAMUS.

This was a motion to make absolute, notwithstanding cause shown, a conditional order for a writ of *certiorari* directed to the Rural District Council of Mallow, to remove and quash certain resolutions of the respondent Rural District Council, made at their adjourned Quarterly Meeting, the 21st February, 1900, at Mallow, in the county of Cork, refusing to consider the applicants' tenders for the maintenance and repair of certain public roads, and for a writ of *mandamus* commanding the Rural District Council of Mallow to enter continuances, and to hear and consider these tenders, which had been sent in by the two applicants "in pursuance of the provisions of the Local Government (Ireland) Act, 1898, and of the Procedure of Councils Privy Council Order of 30th January, 1899, and of the advertisement, issued and published by the District Council, inviting tenders for the works aforesaid, and to determine, in due course of procedure and according to law, whether any, and if so, which, of the said respective several tenders should be accepted by the said District

(1) Before SIR P. O'BRIEN, L.C.J., and ANDREWS, GIBSON, and KENNY, JJ.

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Council," on the grounds (as to the *certiorari*), that the resolutions in question were made and passed without and in excess of jurisdiction, and were not warranted or authorized by the Local Government (Ireland) Act, 1898, or by the Procedure of Councils Privy Council Order of 30th January, 1899, or otherwise by law.

The applicants had been road contractors under the late Grand Jury for many years.

On the 1st February, 1900, the Rural District Council of Mallow, in pursuance of the provisions of the Local Government (Ireland) Act, 1898, and the Procedure of Councils Order of 30th January, 1899, advertised for tenders for the maintenance and execution of certain public works within their Rural District (including six roads, numbered 4, 15, 17, 40, 41, and 47), and the advertisement stated that, at an adjourned meeting to be held on the 21st February, 1900, the Council would consider sealed tenders for the maintenance and execution of these works.

The applicants obtained printed forms of tender from the Clerk of the Council, and tendered for portions of the works mentioned in the advertisement, and named as their guarantors for the due performance of each of the contracts so tendered for, the National Guarantee and Suretyship Association, Limited, of Lower Sackville-street, Dublin, the advertisements having required that the guarantor should be some sufficient company or society willing to guarantee the performance of the contract. The applicants stated that the tenders sent in by them were in all respects formal and correct, and were duly lodged. The applicants alleged that "the District Council and the members thereof had, prior to said 21st February, 1900, frequently stated that they would have the public works and the maintenance of public works and roads within their district executed by 'direct labour,' and not by contract, and with that view, and in order to deter intending contractors, the provision requiring the guarantor to be a company or society was inserted in the advertisement instead of the usual provision of two solvent sureties as under the Grand Jury."

They further alleged that, on the 21st February, the Rural District Council held their adjourned quarterly meeting at the Court House, Mallow, for the purpose of considering the invited

tenders for these maintenance works, that the tenders were opened by the chairman, and the applicants' tenders (six in number) were the only ones in conformity with the advertisement. There were some other tenders for the said works, but (the applicants alleged) the guarantors named were not a sufficient company or society but private individuals, and, accordingly, not in accordance with the said advertisement. They further stated that, on opening the tenders, the Rural District Council resolved not to consider any of them, but to reject them all, and give the work into the charge of the County Surveyor with a view to employ direct labour, and that the Council did not consider any of the tenders, but threw them all aside, and said they would have no contractors for the roads, but would employ direct labour; and they alleged that the action and intention of the Council was to show a colourable compliance with the statute and Orders in Council whilst they were deliberately violating the same.

Mr. Thomas Barry, chairman of the District Council, stated that he had been present at the meeting of the Council on the 24th January, 1900, when it was decided that, in the case of certain of the roads to be maintained, a society should be required as guarantors; that the proviso in question in the advertisement was inserted, in pursuance of this resolution, and in accordance with the Local Government (Procedure of Councils) Order, 1899; that at the meeting of the 21st February, tenders with respect to the maintenance of twelve roads, including those mentioned in the applicants' affidavit, came before the District Council; that with respect to four of them (4, 15, 17, and 40) there was but one tender naming a company or society as guarantor, and in three of these cases the rate per perch was the top price fixed by the advertisement; that, with respect to two others (41 and 47) there were only two tenders naming a company or society as guarantors; that in four of the remaining six cases the tenders were rejected, ordinary sureties being named, and that, in each of the other two, when more than two tenders were sent in a tender was accepted. He denied the averment that on opening the tenders mentioned in the applicants' affidavit, the Council resolved not to consider any of them, or resolved without consideration to reject them all, and give the work into the charge of the

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County Surveyor, with a view to employ direct labour. He stated that the Council did consider each tender sent in, and were for a considerable time engaged in so doing—that each tender was gone into, and the facts connected with it considered, and in each of the cases mentioned in the applicants' affidavit the Council came to the conclusion that there was not sufficient competition, and the Council believed there was collusion between the applicants in sending in their tenders, and that the tenders were too high, and that the Council ought not to accept same, but should leave the works in the charge of the County Surveyor (as had been done previously) until the matter came before the County Council, who could deal with it under the Local Government Order (1). He further alleged that the applicants had not complied with the advertisement, or with the Local Government Orders, as their tenders contained no signature or equivalent thereto by the proposed guarantors, and there was nothing to show or satisfy the Council that the Association were sufficient or willing to give the guarantee for the performance of the contracts, and he referred to a letter of the Secretary of the National Guarantee and Suretyship Association, dated 26th March, 1900, as the only evidence of the guarantors' willingness to give a guarantee. This letter was to the effect that if the tenders were accepted the society would consider the matter. He further deposed that, in rejecting the said tenders, the Council acted in the very best interests of the ratepayers, and by their action caused a very considerable saving of expenditure as compared with the sums mentioned in said tenders.

In reply, the applicants alleged that the resolution passed on the 24th January, 1900, that in the cases of the maintenance of certain roads a society should be required as guarantors, was not passed or agreed upon for the purposes suggested in Mr. Barry's affidavit, but was the outcome of the determination expressed on

(1) The minutes of the meeting of the 21st February, 1900, held for the purpose of considering tenders for works, recorded that:—"The Council were engaged for a considerable time in considering tenders for roads [list appended] . . . No. 4.—Tender according to advertisement, at full price, £112 14*s.* 6*d.*; not considered sufficient competition; referred to County Surveyor. No. 15.—Tender in accordance with advertisement, at full price, £385; Council decided to leave matter in hands of County Surveyor

public platforms and elsewhere by Mr. Barry and other members of the said Council to have the roads maintained by direct labour and not by contract; that in pursuance of this determination a society was required as guarantors by the said Council in twelve out of the twenty contracts; and that in each of these twelve cases in which a society was required as guarantor, the tenders, including those of the applicants, were rejected without any consideration; and they alleged further that it was not the case that the Council considered each tender sent in, or the facts connected therewith; that the Council did not consider their tenders, or any of them, but rejected them all in favour of direct labour; that it was untrue to say or suggest that it was for want of competition, or on the grounds of collusion that the Council rejected them or any of them, and that the suggestion of want of competition and collusion now put forward was an afterthought, to enable the Council to evade the provisions of the Local Government Act, 1898, and Procedure in Councils P. C. Order, of 30th January, 1899. They further said that no exception was taken by the Council to the form of their tenders, or the fitness or sufficiency of the proposed guarantors, or the willingness of said guarantors to give the required security, and that the Council did not consider the question of the sufficiency of the guarantors, at all, or ask any question about them, but decided at once and without consideration to hand the roads in question over to the County Surveyor with a view to employing direct labour.

Ignatius O'Brien, *Q.C.*, and *P. Fleming*, for the applicants.

D. B. Sullivan, *Q.C.*, and *M'Carthy Mahony*, for the respondents.

Cur. adv. vult.

to employ direct labour. Nos. 17 and 40.—[Similar decision to No. 4.] No. 41.—The tenders had the necessary guarantee society—one £84 15*s.*, and the other £92 10*s.*; Council decided that two tenders did not mean sufficient competition, and left road in hands of County Surveyor for direct labour. No. 47.—Two of the tenders had the required guarantee society, and were in at £50 and £56, respectively; the Council decided that two tenders did not mean sufficient competition, and ordered that the road be left in the hands of the County Surveyor to employ direct labour."

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THE QUEEN *v.* R. D. COUNCIL OF MALLOW.

May 4.

SIR PETER O'BRIEN, L.C.J.:—

The present application is one for writs of *certiorari* and *mandamus* to compel the Rural District Council of Mallow to entertain and consider certain tenders for road contracts sent in to that body by the applicants. The point is a very short one, and turns mainly on the 18th Article of the Order in Council of the 30th January, 1899, dealing with the procedure in these matters. Article 18 runs thus:—

(1.) The rural district council or the proposal committee shall, at their adjourned quarterly meeting, *open and consider* the tenders received in respect of proposals formulated by them.

(2.) The council or committee shall not accept any tender unless—(*a*) the person tendering appears and satisfies the council or committee of the sufficiency of the guarantor and the willingness of the guarantor to give the guarantee.

* * * * * *

(4.) Subject to compliance with the provisions of this Article, the council or committee may, at their discretion, accept the lowest or any other tender or reject every tender."

This 4th clause of Article 18 shows that it was intended that a wide discretion should be given to the Councils to accept any tender, whether the lowest or not, and to reject every tender if they thought fit, subject always, however, to the provision of the Order in Council, that they "*shall open and consider*" the tenders received by them.

The question now before us is whether the Rural District Council of Mallow did in fact "consider" the applicants' tenders. It is suggested that they did not take these tenders into consideration at all, and that the Court should direct the Council to do so upon the ground that they rejected these tenders without any consideration whatever, and that they did not in fact exercise any honest discretion in the matter.

As to this, taking the case as a whole, I am unable to say that I am satisfied that the Council did decline to perform their duty, or declined to consider the tenders in question. Upon the affidavit of Mr. Barry, and the entries in the minute book of the Council to which we have been referred, it would appear that in most, indeed substantially in all, the cases before them, the Council—Colonel Longfield and others—unanimously as it would seem, rejected the

tenders upon the ground that there was not sufficient competition; and, it being incumbent on the applicants for *mandamus* to prove that the Council declined to entertain the matter, I am of opinion that the conditional order must be discharged.

Upon another ground also the application must in my opinion fail: namely, that it appears that the applicants did not adduce to the Council any evidence whatever (as they were bound to do under Article 18), of the willingness of their proposed guarantors to become security for the completion of the works to be undertaken.

On both these grounds I hold that the conditional order must be discharged. But, while I am not satisfied that the Council have violated the duties of their office, I cannot but feel that upon the facts before us there is some ground for suspicion that the allegations contained in the applicants' affidavits are not entirely devoid of foundation, especially having regard to the resolution, in favour of "direct labour," passed some time previously by the Council, if that resolution be properly in evidence in the case; and I must say that it would be a melancholy and regrettable thing if the members of this or any District Council did not give the fullest and fairest consideration to matters such as this. Under the Statute these works are to be carried out by tender and contract, and it is only in the ultimate event of there being no accepted tenders (Article 22), that the County Council may give the work into the charge of the County Surveyor to be carried out by what is styled "direct labour." I should hesitate before I imputed such impropriety to the members of this Council, and should not feel justified upon the evidence before us in this particular case in holding that these gentlemen, whose names have been mentioned during the argument, have so far forgotten or abandoned their plain duty as to refuse to consider the tenders received by them, with the object of having the works executed by direct labour through the County Surveyor. I could not hold that they had so abandoned their duty without holding that their action was an organised pretence, and that Mr. Barry's affidavit was falsely and fraudulently made with a view to screen its true motive. Upon the whole case, however, after serious and anxious consideration, I am of opinion that there is not before the Court any sufficient or

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satisfactory proof that the Council declined to perform the duty imposed on them of considering these tenders.

ANDREWS, J. :—

This is an application to make absolute a conditional order obtained by certain contractors (the present applicants, O'Sullivan and Curtin), against the Rural District Council of Mallow, for writs of *certiorari* and *mandamus*—a writ of *certiorari* for the purpose of bringing up and quashing all resolutions of that body made at their adjourned quarterly meeting refusing to consider the applicants' tenders for the maintenance and repair of certain public roads, and a writ of *mandamus* to command them to "proceed to rehear and to hear and consider according to law" the tenders sent in by the applicants for the repair of these roads.

One of the grounds put forward upon which, as urged by counsel for the District Board, the cause shown should be allowed and the conditional order discharged, depends upon the construction of Article 18 of the Privy Council Order of the 30th of January, 1899, which is framed under the Local Government Act of the previous year, and declares, in reference to such tenders, that the rural district council or the proposal committee shall at their adjourned quarterly meeting "open and consider the tenders received in respect of proposals formulated by them." The second clause of this Article provides that the council or committee "shall not accept any tender, unless—the person tendering appears and satisfies the council or committee of the sufficiency of the guarantor and the willingness of the guarantor to give the guarantee"—a preference, which cannot be regarded as in any way an unreasonable one, being given to companies and societies over private sureties.

It seems to me to be clear, upon the construction of Article 18, that the obligation of satisfying the council not only of the sufficiency but of the willingness of the proposed guarantor is one which is to be fulfilled at the quarterly meeting at which the tenders are under consideration. The tenders must be opened to show who the persons tendering are, and who are the proposed sureties; but, upon opening them, and ascertaining who are the sureties, it is not necessary that the Council, if there is no one

there to satisfy them of the sufficiency and willingness of the guarantor, should occupy their time uselessly by further considering tenders which, owing to this fatal defect, they cannot accept.

It is stated that a letter was read to the effect that a guarantee society guardedly intimated that they would be willing to take into consideration the propriety of giving the guarantee if they were satisfied that the contract was accepted. The provision of Article 18, however, is that the meeting must be satisfied of the solvency and willingness of the guarantor; and there would be no difficulty in this being done regularly in compliance with the terms of Article 18, if a verified statement made by the society were produced that, in the event of the tender being accepted, the society were willing to become guarantors, and if evidence were adduced of their sufficiency.

No specific resolution is in evidence before us which the Court could regard as made in excess of jurisdiction and proper to be quashed, and the matter therefore turns upon the application for a *mandamus* only, and the ground that I have referred to is a sufficient reason for discharging the conditional order.

I think it right, however, not to ignore another matter upon which a great deal of the argument has turned. It is the duty of the Council to open and consider the tenders; and this duty would not be discharged unless they gave the fullest consideration to the question of the propriety of accepting or rejecting them if they were in a position to do so. But, so far as the records before the Court go, it appears that there was a consideration of these tenders and of others; and in rejecting them the District Council stated as a ground of their action want of competition in order to allow the County Council to exercise their discretion and to decide whether they should themselves enter into a contract for the execution of the work proposed, or, if no sufficient contractor could be found, whether they should give the work into the charge of the County Surveyor (Article 24, clause 1).

The names of the members of the District Council have been mentioned; and it is possible that these gentlemen may differ in their views upon this question of contract or direct labour, into the

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Andrews, J.

economic merits of which we need not here enter; but the Council were unanimous in their decision; and, having regard to this fact, and to the affidavit of their chairman, which we cannot ignore, I am of opinion that there is no evidence to show that the members of the Council failed to perform the obligation imposed upon them by Article 18. These district councillors were elected under the provisions of a statute which pointed out the mode in which they were to be chosen. The electors have the responsibility of putting into office such persons as are considered qualified to perform the requisite duties, and it would be going very far to assume that persons elected under this Act, by the electorate provided by this Act, have so wholly violated their duty, as the applicants' affidavit alleges that they have done, in refusing to consider the tenders sent in to them, and, from an indirect motive, rejecting them in order to introduce "direct labour" instead of contract.

I think it right to add that, while it is the bounden duty of the Council to entertain and consider all tenders submitted to them, it has not been proved to my satisfaction that these tenders were not taken into consideration by the respondents.

GIBSON, J.:—

The Court is not to be understood as laying down that where a Rural District Council rejects tenders in pursuance of a declared policy to favour direct labour without any *bona fide* consideration, *mandamus* may not be available as a remedy. Paper reasons might always be put forward to screen the true motive of the rejection; but the jurisdiction of the Court, where it exists, cannot be evaded by forms. In this case there was a resolution in 1899 as to employing direct labour, and I regard the action of the Council, who seem to have rejected tenders wholesale, with grave suspicion, though it may be that the applicant has not succeeded in discharging the *onus* of proof. I leave the question of the application and extent of the remedy, where the duty of the Council to consider tenders honestly and fairly has been violated, to future decision when the facts arise.

I concur in the judgment on the ground that when the tenders were opened there was no guarantor then willing to guarantee in

fact. Where there is a fatal defect in the applicant's case *mandamus* is out of the question.

If there had been a willing and sufficient guarantor, but from oversight or otherwise no evidence as to this was required, the tender being rejected on other grounds, and the objection was an afterthought, suggested to meet *mandamus*, the case might present a different aspect.

How willingness is to be testified I do not define. If the security is to be perfected before the County Council under Article 25, clause 1, as argued, the willingness ought to be attested, whether by writing or otherwise, in such a shape as to preclude misunderstanding, negotiation, or delay.

KENNY, J.:—

In effect, this is an application for a *mandamus* to compel the Rural District Council of Mallow to hear and consider tenders for contracts which were sent in by the present applicants. In the view I take of the case there are, in the Procedure of Councils Order of January, 1899, two clauses that are most material. The first is clause 22. [His Lordship read the clause, and continued.]

That clause enunciates the declared policy of the Act on the subject of public works. It is simply this, that, unless in the particular cases mentioned in the clause, the public works of the county are to be executed by contract. The other important clause is No. 18. [His Lordship read the clause and continued.]

At the quarterly meeting it was necessary for the applicant who had sent in his tender to show that he had done everything on his part that was required in order to entitle his tender to consideration. The District Council were to do three things, viz. to open, to consider, and to accept or reject the tenders. In order therefore to bring himself within clause 18, the applicant should have been prepared with proof of the "willingness" of the guarantee society "to give the guarantee." He offered no evidence of such willingness. Not having complied with the necessary conditions, he cannot ask us to grant a writ of *mandamus*.

I offer no opinion as to whether at the quarterly meeting of this District Council there was such a "consideration" of these

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Kenny, J.

tenders as was contemplated by the Act of Parliament. I will only say that there is in the minutes and in the affidavits much that suggests that there was no real consideration of the tenders on their merits, but, on the contrary, that the members of the Council in rejecting the tenders did so in pursuance of a settled policy to substitute in the county administration a system of direct employment of labour for that of contract, and thereby, if possible, to evade the leading provision of the 22nd clause.

SIR P. O'BRIEN, L.C.J.:—

We shall refuse the application, but under all the circumstances of the case we give no costs.

Solicitor for the applicant: *J. Kepple.*

Solicitors for the respondents: *O'Connor & Dudley.*

A. E. R. J.

REG. (DEANE) *v.* CORK COUNTY COUNCIL (1).

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April 23, 26, 27, 28. May 11.

Local Government (Ireland) Act, 1898—"*Existing officer*"—*Deputy cess-collector—Joint deputy cess-collectors—Scheme for collection of poor-rate —*"*Approval*" *of Local Government Board.*

An appointment on 21st March, 1898, by a baronial high constable (himself appointed at the Spring Assizes, 1898) of a person as his deputy to collect the county cess struck by the Grand Jury at the previous Summer Assizes, and who was not re-appointed at the Spring Assizes, 1899, is not sufficient to give to such deputy the status of an "existing officer" within sect. 115 of the Local Government Act, 1898, or to entitle him to compensation for loss of office.

The position of joint deputy cess-collectors discussed.

Semble, the "approval" of the Local Government Board of a "scheme" (under s. 115 of the Act) for the collection of poor-rate should be given by a formal document executed pursuant to sect. 102.

Semble, a county official who claims and accepts compensation for loss of office is not "an existing officer willing to serve," and his election to accept compensation cannot be subsequently withdrawn.

MANDAMUS.

This was an application on behalf of Mr. Arthur Deane to make absolute a conditional order, dated 19th February, 1900, reciting that it was alleged that the scheme for the collection of poor-rate for the county of Cork, already submitted by the said County Council and approved of by the Local Government Board, was not in accordance with the provisions of sect. 115 of the Local Government Act, 1898, inasmuch as it authorised the employment of officers not transferred to, or previously employed by, the said Council, "to the exclusion of the prosecutor, an existing officer, who had expressed his willingness to serve," and ordering that a writ of *mandamus* do issue to the County Council of the county of Cork, commanding that they should "forthwith proceed to submit to the Local Government Board for Ireland a scheme, as

(1) Before SIR P. O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

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prescribed by sect. 115, sub-sect. 10, of the said Local Government (Ireland) Act, 1898, for the collection of the poor-rate for the said county of Cork, in accordance with the provisions of the said section, whereby it was required that such scheme should not authorise the employment of officers not transferred or previously employed by the Council if sufficient existing officers had expressed their willingness to serve": and ordering that a further writ of *mandamus* should issue, if necessary, to the Local Government Board for Ireland, commanding them to approve such scheme when and if the same should be made and submitted in accordance with the provisions of the said section.

By warrant in writing, dated the 21st March, 1898, made (pursuant to sect. 14 of the Grand Jury (Ireland) Act, 1836), by Mr. T. H. Hungerford, High Constable and Collector of Grand Jury Cess for the barony of East Carbery (East Division) and county of Cork, the applicant, Arthur Deane, was appointed jointly with Barnabas B. Deane (his father) as a deputy collector to assist Mr. Hungerford in collecting the Grand Jury Cess payable by the said barony, and assessed at the Cork Summer Assizes, 1897; and the applicant stated that he had collected the County Cess in said barony under that warrant.

By a similar warrant executed after the Spring Assizes of 1898, the applicant was appointed by Hungerford as his deputy, to collect for him the Grand Jury Cess payable by the said barony, and assessed at the Cork Spring Assizes of 1898.

By a similar warrant dated the 12th October, 1898, the applicant was appointed by Hungerford as his deputy to collect the Grand Jury cess payable by the said barony, and assessed at the Cork Summer Assizes, 1898; and the applicant stated that he had duly discharged his duty as such deputy under these warrants, and claimed to have been deputy collector duly appointed at the coming into operation of the Local Government (Ireland) Act, 1898.

By similar warrants, from 1892 to 1897, the applicant, jointly with his father, had been, from time to time, appointed deputy to to the then High Constable and Barony Collector to collect the

Grand Jury cess, from time to time levied upon the said barony (West Division), and the applicant stated that he had duly discharged the duties of such deputy, and claimed that he was at the coming into operation of the Local Government (Ireland) Act, 1898, deputy collector duly appointed as aforesaid.

The applicant further stated that his father, B. B. Deane, had, for about forty years, acted as collector of poor-rate for the Guardians of the poor of the Clonakilty District in county Cork, partly within the barony of East Carbery, and that he was now about seventy-six years of age, and that, owing principally to his advance in years and feebleness, the applicant had, for some years past, assisted him in the collection of the said poor-rate, discharging almost the entire duties.

He had, in reply to a circular from the County Council, notified his willingness to serve as their officer. In the result, however, the County Council omitted the applicant's name from the scheme settled by them for the appointment of rate collectors under the Act of 1898; and the applicant alleged that this scheme improperly authorized the employment of officers not transferred to or previously employed by the Council to the exclusion of himself, an existing officer, who had expressed his willingness to serve. He also suggested that the omission of his name was due to the personal hostility of certain members of the Board. The County Council filed affidavits to resist the application, alleging that the prosecutor had not shown that he was "on the last day of March, 1898, and on the appointed day" under the Local Government (Ireland) Act, 1898, a deputy cess collector duly appointed, or that at these dates he had then in force any duly executed appointment as such collector. They also alleged that he did not devote his whole time to the work of rate-collection, but was engaged in carrying out a contract with the Grand Jury (incompleted) in connexion with a pier at Schull, and was also a contractor for the maintenance of roads.

Mr. Mooney, Secretary of the Local Government Board, filed an affidavit, on behalf of the Board, in which he stated that the Board had, on the 19th June, "duly sanctioned the said scheme subject to some slight modifications," and "that the

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scheme so sanctioned was in accordance with the provisions of" sect. 115, sub-sect. 10(1).

Mr. Mooney further stated that, in the "Scheme," the office of collector for the Clonakilty district was described as vacant, and that after some appointments by the Council to that office, which the Board declined to sanction, a Mr. Eugene M'Carthy had been duly appointed to the office, and his appointment sanctioned by the Board. In regard to this Mr. Mooney deposed that on the

(1) It appeared that the sanction or approval of the Local Government Board to the scheme, &c., was not recorded in any formal resolution or order of that body, but was expressed only in the following letters:—

LOCAL GOVERNMENT BOARD, DUBLIN,

19*th June*, 1899.

SIR,—I am directed by the Local Government Board for Ireland to state that they have had under consideration the scheme made by the Cork County Council for the collection of the poor-rate in the county, from which they observe that in forty-two of the forty-five collection districts into which the county is proposed to be divided, "existing" officers have been appointed by the Council in accordance with the provisions of sect. 115, sub-sect. 10 of the Local Government (Ireland) Act, 1898.

In the remaining three cases in which "existing" officers have not been appointed, the facts are briefly as follows:—

* * * * * *

2. CLONAKILTY UNION.—The County Council have not recognised the claim of Mr. Arthur Deane, deputy cess collector, to be employed under the scheme, and they have accordingly deferred appointing a collector to the No. 1 district of the Union.

From the information received by the Local Government Board in reference to this case, they do not see how the Council can legally refuse to appoint Mr. Deane as collector, and the scheme therefore must be modified accordingly.

* * * * * *

With regard to the general proposal to allow the rate-collector sixpence in the pound on all rates collected and lodged by them, the Board desire to refer the Council to sect. 115, sub-sect. 11, of the Local Government Act, from which it will be seen that the scheme must provide for the "existing" officers employed under it receiving remuneration substantially identical with that which they formerly received. In order to comply with this requirement, the Council should defer finally fixing the poundage rate to be allowed to each

28th October, 1899, the Board received a letter from the Secretary of the Cork County Council stating that the Council had appointed Mr. Eugene M'Carthy of Schull as collector for the said Clonakilty, No. 1 District, he being a duly appointed deputy to Mr. Abraham Jagoe (who was the Baronial High Constable for the Barony of West Carbery, West Division); that Mr. M'Carthy not having been included in the aforesaid scheme had been awarded a sum of £130 which was duly paid to him, and that he had applied

collector until the amount of rates to be collected in each case shall have been definitely ascertained.

Subject to the modifications referred to in this letter, the Board approve the scheme.

I am, Sir,

Your obedient Servant,

THOMAS A. MOONEY, *Secretary.*

To CAPTAIN NOBLE W. JOHNSON

(Secretary, Cork County Council).

LOCAL GOVERNMENT BOARD, DUBLIN,

19*th July*, 1899.

SIR,—I am directed by the Local Government Board for Ireland to acknowledge the receipt of your letter of the 14th instant, transmitting a copy of a resolution passed by the County Council of Cork at their meeting on the 13th instant relative to the appointment of Mr. B. B. Deane as poor-rate collector in a district in Clonakilty Union; and I am to state that the Board find Mr. B. B. Deane is seventy-six years of age, and that they cannot under the circumstances approve his appointment as rate collector.

With regard to the reason assigned by the Council for rejecting the claim of Mr. Arthur Deane to be appointed as collector in the district in question, namely, that he is a contractor for the maintenance of roads in this county, I am to inform the Council that the Board are advised that entering into a contract for repairs does not amount to holding "a paid office or place of profit" under the Council, and consequently does not disqualify the person contracting from holding the position of collector of the poor-rate.

The claim of Mr. Arthur Deane, who is an "existing" officer within the meaning of the Local Government (Ireland) Act, 1898, cannot, therefore, be set aside on the grounds mentioned. Subject to the exclusion of Mr. B. B. Deane from the scheme on account of old age, and to the observance of the

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for the post of collector, and was willing, if appointed, to hand back the said gratuity of £130 and reside in the district; that the Board were advised that if the said gratuity was duly refunded to the County Council pursuant to section 115, sub-section 13 of the said Local Government (Ireland) Act, 1898, there would be no legal objection to the appointment of the said Eugene M'Carthy as collector of the said district; and on being duly satisfied that the said gratuity of £130 had been refunded to the County Council by the said Eugene M'Carthy, the Board sanctioned his appointment by the said Council as collector of the said district.

The Board submitted that they had not declined the performance of their duties in any way, and that there was no reason why a writ of *mandamus* should be directed to them.

The Right Hon. The Macdermot, Q.C., J. H. Campbell, Q.C., and *Sheehan*, for the applicant.

M. Bourke, Q. C., and *M'Carthy Mahony*, for the County Council.

Matheson, Q.C., and *George Green*, for the Local Government Board.

Cur. adv. vult.

May 11.

SIR P. O'BRIEN, L.C.J. :—

Mr. Arthur Deane, who is the prosecutor in this case, has applied to the Court for a writ of *mandamus* to compel the County

provision contained in section 115 (10) of the Act with respect to Mr. Arthur Deane, the Board approve of the scheme.

I am, Sir,

Your obedient Servant,

D. J. MAC SHEAHAN, *Assistant Secretary*.

CAPTAIN NOBLE W. JOHNSON.

LOCAL GOVERNMENT BOARD, DUBLIN,

13*th November*, 1899.

SIR,—The Local Government Board for Ireland acknowledge the receipt of replies to their inquiries respecting the appointment of Mr. Eugene M'Carthy as poor-rate collector in the county of Cork, and the Board approve of the

Council of the county of Cork forthwith to proceed to submit to the Local Government Board for Ireland a scheme as prescribed by section 115 of the Local Government (Ireland) Act, 1898, for the collection of the poor-rate of the county of Cork. It is to be noted that, though this application is conversant with the office of cess collector, and not of poor-rate collector, "poor-rate" alone is mentioned because the Local Government Order of 1899 provided that, for the expression "county cess" and "Grand Jury cess" respectively, there should be substituted the expression "poor rate." A scheme had been already submitted by the County Council to the Local Government Board, and the latter body had informally by correspondence purported to approve of the scheme. This scheme, as submitted by the County Council, is arraigned, however, by Mr. Deane, who was omitted from it, on the ground that his omission from it was in direct violation of the statute; and he points to section 115, sub-section 10, which in effect provides that all existing officers, if there be places for them within the scheme, shall be included in it. There is no doubt that this is so. If there be room for an existing officer within the scheme, the obligation to include him is imperative. But then comes the question, Was Mr. Arthur Deane an "existing officer" at the crucial times. An "existing officer" is defined by the Act of 1898, section 109, to mean, as respects any officer, an officer holding office on the last day of March, 1898, and also

appointment, on the terms specified, and on the condition that he immediately refund the gratuity of £130 awarded to him by the County Council, as required by section 115 (13) of the Local Government (Ireland) Act, 1898.

When Mr. M'Carthy shall have refunded that amount, one-half of it (£65) must be repaid by the County Council to the Local Taxation (Ireland) Account in pursuance of the section and sub-section referred to.

The cheque for that amount should be forwarded to the Local Government Board.

I am, Sir,

Your obedient Servant,

H. M. SWAINE, *Secretary*.

THE SECRETARY,
Cork County Council.

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on the "appointed day"; and, in any other cases, existing at the time specified in the enactment in which the expression is used; and, if no such time is expressed, then on the appointed day for the coming into operation of such enactment. Having regard to this definition, Mr. Arthur Deane should have held office on the 31st March, 1898, and the 1st April, 1899. Did he do so? The office in respect of which he claims was the office of deputy cess collector. In the argument, his counsel relied upon a series of warrants: in the first place on two single appointments, dated, respectively, 1st June, 1898, and the 12th October, 1898. It is plain that these warrants of appointment do not suffice. They do not comprise the 31st March, 1898; they are both subsequent to that date. It is true that there was by Mr. Hungerford (his appointments alone were relied upon in argument) a joint appointment by him of Mr. Arthur Deane and of his father, Mr. Barnabas Deane, on the 21st March, 1898. This did, of course, cover the 31st March, 1898, but it did not extend to the 1st April, 1899. The Grand Jury can only appoint from Assizes to Assizes. Mr. Hungerford's appointment as barony cess collector enured only from Assizes to Assizes; and, if this is so, of course any appointment made by him fell with his own appointment. That he held only from Assizes to Assizes is, I think, decided by, or necessarily follows from, the case of *Hussey* v. *Holmes* (1). That case was heard before Mr. Justice Crampton and Mr. Justice Burton, two Judges of great authority, sitting together; but independently of this case I think it is plain from the fluctuating and evanescent character of Grand Juries that the appointment of barony cess collector lasted only from Assizes to Assizes; and this view is entirely borne out by the fact that power was given to Grand Juries at the Spring Assizes for 1899 to appoint barony cess collectors and deputy cess collectors for three months only.

I am of opinion then that Mr. Deane was not an existing officer within the meaning of the Local Government Act, and that accordingly his application for a *mandamus* must fail.

I am desirous, however, not to omit reference to the fact that

(1) 3 Cr. & D C. C. 397.

the application before us is made by Mr. Arthur Deane alone. He is sole prosecutor. The Crown Office Rules require that it should be stated who the prosecutor is. He alone is stated to be the prosecutor. The proceeding does not include the name of his father. As at present advised, I am not satisfied that one of two holders of a joint office is a competent prosecutor with respect to it; but I think that, in this connexion, we cannot disregard the fact that his father, Mr. Barnabas Deane, is an old gentleman of 76 years of age, entirely beyond all efficient work. Mr. Arthur Deane, the applicant, states in his affidavit that his father is now about 76 years, and that, owing principally to his advancing years and feebleness, he assisted in the collection of the cess, discharging almost the entire duties; and it was plainly intended that Mr. Arthur Deane alone should be prosecutor.

There are also some matters to which I should like to advert. It is quite clear that Mr. M'Carthy was not an "existing officer." He was not an officer duly appointed under hand and seal pursuant to the provisions of the Grand Jury Act; and the Local Government Board were not justified, though the mistake was a very natural one, in dealing with him as such because the Treasury had dealt with him as such. His *status* as an existing officer was not to be determined by the Treasury. This was laid down by this Court in *Reg.* (*Brown*) v. *Wicklow County Council* (1), and that case is entirely borne out by the *Sandwich Case* (2). Nor do I think that a man who receives a gratuity and returns it, under the 13th sub-section of section 115, can be regarded as thereby rehabilitating himself in the official character of which he was divested when he took the gratuity therein referred to.

There is another matter of very considerable general importance to which it is well to refer: that is to say, whether there was any formal approval of the scheme of the County Council by the Local Government Board. Some letters were referred to as evidence of approval. In my judgment the important official act of approving of a scheme submitted by the County Council cannot be properly done by letters written by the Secretary of the Board. It must

(1) [1900] 2 I. R. 351. (2) 10 Q. B. 553.

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be officially done in a formal document executed pursuant to the provisions of section 102 of the Local Government Act. If such a document had been executed in this case, and if Mr. Arthur Deane came within the definition of "existing officer," and there was no difficulty as to his *locus standi*, he would, in my opinion, be plainly entitled to redress, whether by writs of *certiorari* and *mandamus*, or by *mandamus* alone. I am inclined at present to think that, if the scheme had been formally approved of by the Local Government Board, a writ of *certiorari* would be essential, but that, in the absence of that approval, a writ of *mandamus* alone would suffice.

I now come to the question of costs. We refuse the application, and the ordinary rule is that costs should follow the result; but in the present case we decline to give costs. It is quite plain that some members at least of the County Council were influenced by considerations that they should not have at all permitted to be present to their minds. Mr. Deane has stated in his affidavit that several members of the County Council had denounced him and his father as land-grabbers, and had stated that, no matter what it might cost the county, neither his father nor himself should be appointed. It cannot be too clearly impressed upon the County Councils of Ireland that, if they allow themselves to be influenced by extraneous and irrelevant topics—I use no harsher expression—the rate-payers will be the sufferers, and that too by the action of the men whose duty it is to protect them. We refuse the application and give no costs.

GIBSON, J.:—

The question that presents itself at the threshold is whether the prosecutor has any right to apply as an existing officer. The conditional order is based on the allegation that a scheme has been submitted to and *approved* by the Local Government Board, violating section 115 of the Local Government Act by authorising the employment of officers not previously employed, to the exclusion of the prosecutor as an existing officer. The affidavits on which the conditional order is based, like the order itself, put the case of Mr. Arthur Deane as that of an existing officer in his own right. Paragraph 7 of his affidavit alleges that he stated his willingness

to serve by letter before May 12th. There is no similar allegation as to his father, B. B. Deane, who, at the meeting of May 19th, stated to the Council that owing to his age and health he could not discharge the increased duties cast upon him by the Act; and the Local Government Board, on July 19th, declined to approve of him on that ground. In the 13th paragraph it is alleged that it was fully admitted that Mr. Arthur Deane was an existing officer, and nothing is said about Mr. B. B. Deane. The application is made plainly on behalf of Mr. Arthur Deane, and not on behalf of the Messrs. Deane jointly.

The position of Mr. Arthur Deane and his father, B. B. Deane, was as follows:—They were appointed on March 21st, 1898, to the office of deputy collector by Mr. Hungerford, the collector, in respect of the cess at the Summer Assizes of 1897, laid on the barony of the East Division of East Carbery, amounting to the sum of £3151 9*s.* 5*d.* Why Mr. Hungerford, who (under section 147 of the Grand Jury Act), must have been re-appointed at the Spring Assizes, came to appoint deputy collectors for the cess of the previous Summer Assizes is not explained. On May 25th, 1898, Mr. Hungerford received the Treasurer's warrant to collect the cess, on the same barony, fixed at the Spring Assizes 1898, amounting to £1790 19*s.* 8*d.*; and it is alleged that, on June 1st, 1898, he appointed, by a warrant not forthcoming or verified, Arthur Deane sole deputy collector. Similarly, for the Summer Assizes, Hungerford, after receiving the Treasurer's warrant on October 1st, appointed Arthur Deane, by warrant dated October 12th. There was no re-appointment of the Messrs. Deane or either of them at the Spring Assizes, 1899, under the Privy Council (No. 2) Order, 1898, Article 3, section 4.

With regard to part of the West Division of East Carbery, the Messrs. Deane had acted under a joint appointment as far back as 1892. The Treasurer's warrants were issued to Mr. Welply for the Spring and Summer cess, 1898, dated, respectively, May 25th and October 1st, while the appointments of the Messrs. Deane are dated June 1st and 21st November, 1898, respectively. These appointments, unlike those executed by Mr. Hungerford, purport not to be limited to any particular cess, and extend to all cess and arrears due.

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In argument the case was entirely based on the Hungerford appointments, and it was hardly disputed that the only appointment that could be relied on as creating the *status* of an existing officer was the joint appointment of March 21st.

Before discussing the legislation on which the decision must rest, I have to point out (what was indeed admitted) that a joint office of trust is entire, and determines by the death or resignation of either of the holders: see Bacon's Abridgment Title "office" (K. p. 37): *Keon* v. *Hart* (1). So far therefore as relates to any office held by the Messrs. Deane jointly, the prosecutor has to show how and why he can sustain the application in his own name, without joining his father; and how a *mandamus*, which clearly applies to his claim as an individual officer, can also be made to extend to another office held jointly. No authority was cited to support such a *mandamus*.

To apply the Local Government legislation, we must recollect what were the enactments of the Grand Jury code as to collectors and their deputies. Under the Act of 1836 a collector was to be appointed at each Assizes (section 147) who was required to give security before the Grand Jury at that Assizes that he would collect and pay to the treasurer on or before the first day of next Assizes all such public money as he was required to collect (section 148). There was a special provision for supplying the post *pro tempore*, in the event of death or other vacancy. Under section 150 the collector to whom the warrant was directed was to levy and pay to the treasurer two days before the first day of next Assizes, and the warrant was to be in force for two years notwithstanding the death or resignation of the person to whom it was originally addressed. Section 148 authorised the collector to appoint deputies to assist in collecting.

Under this statute it was held that the collector for the time being was entitled to sue under section 153: *Hussey* v. *Holmes* (2). This decision, which has been acted on for upwards of half a century, necessarily involves that the original collector could not sue. Simultaneous rights of action in different persons in respect of the same warrant would be contrary to all legal principle.

(1) I. R. 3 C. L. 388. (2) 3 Cr. & Dix. C. C. 397.

It was suggested that *Hussey* v. *Holmes* (1) only applies where the original collector is actually displaced and succeeded by a new officer. This is by no means certain, for the word "removed," in section 150, does not necessarily mean more than "not re-appointed," and, unquestionably, the collector ceases to hold office unless he is re-appointed. The deputy cannot stand in a higher position than his principal. He may give a continuing security, but at each Assizes he ought to receive a new appointment.

Turning now to the Local Government Act, we find that deputy collectors are officers (section 115), and the only question is, are the Deanes officers who come within the definition of "existing" in section 109. An existing officer must have held office on March 31st, 1898, and on April 1st, 1899. The section does not expressly state that the office must have been held continuously between these periods, though this is probably the meaning. As to the East Division, there was a joint appointment in force in March, 1898, for the Summer cess of the preceding year. When this cess was completely collected does not appear. Arthur Deane, by himself, was appointed for the Spring and Summer levy, but the dates of his appointments are such as to make it impossible to hold that he was in office on March 31st (within section 109), or that he was appointed "at the Summer Assizes," 1898, within the Privy Council Order, 1898 (No. 2) section 4. Supposing that his individual appointments in his own name had been made before the end of March, could he and his father have applied under the joint appointment as existing officers, and at the same time could Arthur Deane have applied in his own right as existing officer in respect of the other or several office? Whatever the powers of Mr. Hungerford were, and even assuming that there was cess, under the joint warrant of March 21st, uncollected up to April 1st, 1899, there would seem to be some difficulty in holding that the appointment of March 21st was such an existing office as the statute contemplates, when the entire collection of 1898 was entrusted to Arthur Deane alone.

But, however this may be, when we look at the second period named in section 109, namely, the 1st April, 1899, a conclusion

(1) 3 Cr. & Dix. C. C. 397.

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adverse to the applicant seems inevitable. The Privy Council Order (No. 2) of December, 1898, authorises the Grand Jury at the Spring Assizes of 1899 to re-appoint for three months any collector or deputy under section 148 of the Act of 1836 who was appointed at the Summer Assizes of 1898. This provision assumes (*a*) that but for such re-appointment the office of collector or deputy (which was only from Assize to Assize) would have expired; and (*b*) it requires that the power should only be exercised in favour of those who could show continuity of tenure by their office having been kept alive at the Summer Assizes. The enactment may be founded on mistake, as the Grand Jury never appointed or were in privity with deputy collectors, but it has the force of statute by virtue of section 107.

In the discussion before us no reliance was placed by applicant's counsel on the appointments made by Mr. Welply, dated June 1st and November 21st, which are not even verified as exhibits. They are all joint, and do not show that the office was full on March 31st, 1898, or that there was any appointment at the Summer Assizes, nor does it appear that the Grand Jury at the Spring Assizes, 1899, made any re-appointment.

In his own right the applicant has failed to show that he is an existing officer. The joint office is not relied upon in the conditional order and affidavits, nor, even if it was, were the father and son existing officers in respect of such office. The application for *mandamus*, therefore, fails.

The difficult topics discussed in argument—such as whether the remedy, after a scheme has been approved of by the Local Government Board, was *mandamus* or *certiorari*, or otherwise, or whether the Board could itself directly make the necessary modifications in a scheme, or must remit it to the Council with proposed modifications for their adoption—the powers of the Board being treated as merely negative—must be left to future decision.

I may add a word upon some matters upon which, as they were fully discussed, the Board may desire guidance.

The approval of the Board should be testified by formal act; and it ought to be express and unambiguous. If the approval was an act done, within section 102, a mere Secretary's letter in

pursuance of an oral direction, notifying approval, may be insufficient. The approval is an official act in reference to a complete scheme. It is very doubtful whether, even if section 102 does not apply, the letters of June 19th, July 19th, and November 13th, are such an approval as the Act contemplates. A scheme ought to be formally approved, and the date of such approval should be certain.

I am clearly of opinion that the Board were wholly wrong in allowing M'Carthy, on refunding the compensation money, to be treated as an existing officer. His claim and acceptance of compensation were a conclusive election showing that he was not an existing officer willing to serve. Section 115, sub-section 13, did not apply at all. It relates to a new appointment, and does not enable an old officer to be restored to the prejudice of others. M'Carthy was not an existing officer, and never stated before May 12th his willingness to act.

I am also of opinion that the Board erred in treating the decision of the Treasury, allowing M'Carthy compensation as an existing officer (which was wholly erroneous, as he was never duly appointed deputy), as an adjudication which could affect Deane's rights if he had any: *Sandwich* v. *Reg.* (1). The Treasury seem to have overlooked the provisions of the statute, or considered that they might be disregarded, as the compensation was deducted by consent from the sum allowed to the collector.

If the prosecutor possessed the *status* of existing officer, I should be disposed to allow the writ to go. The limit of time prescribed by section 115, sub-section 10, is clearly directory only; and so long as the scheme has not been approved, the Court can compel the County Council to frame a proper scheme not violating the rights of existing officers. What would be the position and rights of Mr. Deane (if an existing officer) had the scheme been approved, seems to me a matter of much difficulty, on which I do not think it desirable to hazard any expression of opinion.

The action of the Council (who regarded Deane as an existing officer) in excluding Deane on account of an agrarian dispute,

(1) 10 Q. B. 563.

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displays regrettable bias and a culpable disregard of their duty and of the express injunctions of the statute.

KENNY, J.:—

I concur. The case is an important one, inasmuch as its discussion involved the consideration of the *status* of county officials, who had either, directly or indirectly, been in the service of Grand Juries, their rights under the Local Government (Ireland) Act of 1898, and the relations existing between County Councils and the Local Government Board. We have listened to very elaborate arguments in this triangular discussion, and were much interested in the divergent views taken by the respective parties of the powers of the Local Government Board and of their action in purporting to approve of a scheme under sect. 115, sub-sect. 10, which, contrary to the provisions of that sub-section, proposed to appoint as an officer of the Connty Council, one who was not an "existing officer" within the Act. That Mr. Eugene M'Carthy was not an existing officer, and ought not to have been proposed by the County Council or adopted by the Board, I entertain no doubt; but the defect in the scheme, arising from this miscarriage, is one that this Court cannot take steps to rectify unless its action is invoked by a prosecutor whose rights or interests entitle him to come here. Mr. Deane, the prosecutor, claims to be a party aggrieved by the scheme, on the ground that he was an "existing officer" of the County Council, who, in the words of the sub-section, had expressed his willingness to serve his new masters, and ought to have been included in the proposal of the County Council. If he be right in that contention, he unquestionably would obtain a position of a practically permanent character, for by Article 10 of the County Poor Rate Collectors Order of 17th April, 1899 (1), a collector, subject to a right of suspension by the County Council under Article 11, is to continue to hold office until he die or resign or be removed by the Local Government Board. I apprehend that for deprivation of such an office, *mandamus* would certainly lie; but his *status* has been directly challenged, and the controversy between him and the County

(1) Vanston, p. 482.

Council has, to a very large extent, turned on the question whether he be an "existing officer." If he be not, there is an end of the case, inasmuch as the Act gives him no right of transfer or retention.

To come within the category of existing officers of a Grand Jury transferred to the County Council, Mr. Deane must bring himself within the provisions of sections 115 and 109 of the Local Government Act. He does not claim as a barony constable or collector of county cess appointed by the Grand Jury, but merely as a deputy of the barony constable. Without the assistance of the 115th section he would have no *locus standi* as an officer in the service of the Grand Jury, because his office had for its creation and continuance merely a private arrangement with the barony constable, which was allowable by the 148th section of the Grand Jury Act. But the 115th section says that, for the purpose of transfer to the County Council, he is to be "deemed" to be an officer of the Grand Jury. Having thus obtained statutable recognition for his office, the further burden is cast on him of showing that he was an "existing" officer. In order to be such, he must have held his office on two dates, namely, the 31st March, 1898, and the 1st April, 1899, the latter being "the appointed day" (section 109). As I have said, he derives his official existence wholly from the barony constable, and he must stand or fall with that official. The latter had, under the late Grand Jury system, to be appointed at each Assizes, and while his warrant from the Treasurer remained in force for two years for collection purposes (Grand Jury Act, 1836, section 149), his own office as collector dropped at the next following assizes. This is clear from section 148 of the Grand Jury Act, and the amending Acts, 11 & 12 Vict. c. 26, and 11 & 12 Vict. c. 32. The prosecutor claimed to have been appointed by two barony constables under five warrants, three of which constitute himself and his father as joint deputies, while two are in favour of himself alone. All of them bear date in the year 1898, and there is but one which is previous in point of date to the crucial period, the 31st March, 1898, and very strangely that one, which is dated the 21st March, 1898, and is a joint appointment, is for the collection of the rate which was presented for at the Summer Assizes in 1897. The only

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evidence that has been given of the appointments of two barony constables is the production of the treasurer's warrants to them in May and October, 1898. No resolutions of the Grand Juries are forthcoming, nor is there even a treasurer's warrant before the 21st March, 1898, to establish that at the latter date they held office. I therefore think it extremely doubtful—though counsel for the County Council was inclined, at least for the purpose of his argument, to admit it—whether the prosecutor and his father could be said to be in office on the 31st March, 1898. But, assuming that they were in office on that date, and were reappointed both before and after the Summer Assizes of 1898, their offices must have determined at the Spring Assizes of 1899, before the arrival of the "appointed day," the 1st April. The framers of the Orders in Council seem to have anticipated that a difficulty would arise in the case of the collectors with reference to their competency to fulfil the necessary conditions for the definition of "existing officer"; and, by the 4th clause of the Local Government (Transitory Provisions) (No. 2) Order 1898 (1), express power was given to the Grand Juries at the Spring Assizes of 1899 to reappoint for three months "any high constable and collector or collector of a barony," or *deputy collector* under section 148 of the Grand Jury Act, 1836, who was appointed at the Summer Assizes of 1898." This clause erroneously assumes that the power of appointing deputy collectors rested with the Grand Jury. The object of it, however, is plain. The power was, so far as we know, never exercised in favour of the prosecutor, and in the absence of evidence of any appointment that would bring the continuance of his office up to the 1st April, I must hold that he does not come within the meaning of existing officer as defined by section 109.

I give no opinion as to the other points that were argued, namely, as to the competency of the prosecutor to maintain his application without joining his father, or to ask for a *mandamus* for the insertion of his own name alone in the scheme.

On the question of approval of the scheme by the Local Government Board, I concur with the other members of the Court in thinking that such approval ought to be given by some

(1) Vanston, p. 187.

formal and unambiguous document, and that it should not be left at large for controversy as was done in the present case. What power of modification of the County Council scheme is vested in the Local Government Board, and how it should be exercised, it is unnecessary for us to decide.

I agree that we should not give costs against the prosecutor. On his affidavits, which in this respect are expressly and advisedly left uncontradicted by the Secretary of the County Council, Mr. Deane appears to have been treated with singular injustice, by at least a considerable section of this County Council. He and his father had collected the rates for many years, and, until this application, the County Council do not seem to have questioned his *status* as an existing officer, yet, at meeting after meeting of the Council, when the Messrs. Deane attended to press what they regarded as their legal claims, they were publicly denounced as what is called "land-grabbers," and it was stated that the prosecutor would never be included in the scheme unless he undertook to get his father to surrender an evicted farm that he was in occupation of. To such an extent did they carry their unfair treatment of the Messrs. Deane, that they appear to have allowed a son of the evicted tenant to attend one of their meetings and address them in opposition to the prosecutor's claims. Such conduct cannot be too strongly condemned, and we would, in my opinion, be condoning it if we allowed costs against Mr. Deane.

Solicitor for the relator: *Travers Wolfe.*
Solicitors for the County Council: *T. Exham & Son.*
Solicitor for the Local Government Board: *Mecredy.*

A. E. R. J.

H. L. 1901. May 13, 14.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS; PRIESTLEY, RESPONDENT.

Estate duty—Finance Act, 1894, *sect.* 5, *sub-sect.* 2—*Settled property.*

APPEAL from the decision of the Court of Appeal in Ireland: [1900] 2 I. R. 400.

The Attorney-General (*Sir R. Finlay, K.C.*), *The Solicitor-General for Ireland* (*Wright, K.C.*), *Vaughan Hawkins* (of the English Bar), and *C. E. Mac Dermot*, for the appellants.

Ingpen, K.C. (of the English Bar), and *A. C. Meredith*, for the respondent.

May 14.

THE HOUSE OF LORDS (Earl of Halsbury, L.C., and Lords Macnaghten, Morris and Killanin, Shand, Davey, Brampton, Robertson, and Lindley) affirmed the decision of the Court of Appeal, with costs (1).

Solicitor for the appellants: *R. O'B. Furlong, Solicitor of Inland Revenue for Ireland; Agent, F. C. Gore, Solicitor of Inland Revenue for England.*

Solicitors for the respondent: *Rooke & Rooke; Agents, Whitfield & Harrison.*

(1) W. N. 18th May, 1901, p. 103; see also report 17 *Times'* Rep. 507.

THE LORD MAYOR, ALDERMEN, AND BURGESSES OF DUBLIN, Appellants; THE IRISH CHURCH MISSIONS and REV. P. B. JOHNSTON and HENRY MUMFORD, Respondents.

Q. B. Div. 1900. Oct. 27, 29. Nov. 28.

Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52) *sects.* 40, 41—*Bye-laws—Reasonableness—Buildings of a temporary character.*

The defendants were prosecuted under the Public Health (Ireland) Act, 1878, sects. 40 and 41, and the Dublin city bye-laws framed thereunder—(*a*) for erecting a new building of wood within the Urban Sanitary District without giving the required notice to the complainants; (*b*) for erecting a building not enclosed by walls of incombustible material; and (*c*) for erecting a building projecting beyond the front of the buildings on either side of it in the street without the required consent. The building in question was a removable structure (65 feet by 21 feet), with a canvas roof, composed entirely of wood, made up in sections, which could be put together or taken down in a few days. It "was intended for, and actually used as, a temporary structure at" the place in question, and was erected for use there only for a few months for the purpose of religious meetings. On a case stated for the opinion of the Queen's Bench Division:—

Held (by Lord O'Brien, L.C.J., and Boyd, J., Barton, J., *diss.*), that the Public Health Act, 1878, and the Dublin bye-laws framed thereunder, contemplated buildings of a permanent character, not temporary structures such as the premises in question.

Case stated for the opinion of the Queen's Bench Division of the High Court of Justice in Ireland at the instance of the Lord Mayor and Burgesses of Dublin, pursuant to 20 & 21 Vict. c. 43, by Mr. Daniel Mahony, one of the Divisional Justices for the Dublin Metropolitan District.

The case stated was to the following effect:—

On 8th November, 1899, the defendants were charged in and by three summonses:—

By the first that they, in or about the month of October, 1899, commenced the erection of a building, to wit, a building

(1) Before Lord O'Brien, L.C.J., and Boyd and Barton, JJ.

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constructed almost entirely of wood, situate at Belvidere-road, in the Urban Sanitary District of Dublin, to which the complainants' bye-laws, in that behalf related, without having given notice of such intended erection to the complainants as such sanitary authority, or delivered any plans and sections of such building, nor any description in writing of the materials of which it was intended that such building should be erected, as required by the said bye-laws, contrary to the form of the statute and bye-laws in such case made and provided.

By the second, that they in or about the month of October, 1899, erected a new building, to wit, a building constructed almost entirely of wood, situate at Belvidere-road, in the Urban Sanitary District of Dublin, to which the bye-laws in that behalf of the complainants related, which was not enclosed with walls of hard and incombustible material, as required by the said bye-laws, contrary to the form of the statute in such case made and provided.

By the third that they did, on or before the 21st day of October, 1899, within the Urban District of Dublin, to wit, at Belvidere-road, in said district, erect a house or building forming part of said street beyond the front of the house or building on either side of the same, without the written consent of the Urban Sanitary Authority, and that they had continued same after the receipt of written notice in that behalf from the Sanitary Authority on the 26th October, 1899, contrary to the form of the statute in such case made and provided.

The first two summonses were brought under bye-laws which purported to be made pursuant to sect. 41 of the 41 & 42 Vict. c. 52; and the third summons mentioned was brought under sect. 40 of the same Act as amended by the Public Health Act, 1896, sect. 26.

The learned magistrate dismissed all three summonses.

At the hearing of the three complaints (which were heard together) Walter Butler, on behalf of the complainants, deposed that he was their building surveyor, and had seen the building in question in the course of erection, that no plans or notice had been lodged with the Corporation. The building was composed entirely of wood and made up in sections, which could be put together or taken down in a few days; that he had been informed they were

erected only for a few months; the building had a canvas roof and a stove and chimney; it measured 65 feet by 21 feet by 10 feet; the building projected beyond the building-line of said road, and was erected by defendants beyond the front wall of the houses or buildings on either side. The bye-laws of the Corporation, dated the 3rd day of November, 1880, were put in and proved.

Henry Mumford, one of the defendants, was not sworn, but stated that he admitted his letter to Mr. Harty, dated the 23rd October, 1899, enclosing a photograph of the building; and he produced the agreement under which the premises on which the building was erected were held, under which the site was to be vacated on or before the 7th January (1).

Counsel for defendants admitted that no notice had been given or plans lodged by them with the Corporation, and contended that the structure, being merely a temporary one, was not a building within the meaning of the Public Health Acts or the bye-laws, and that, even if it were, the bye-laws sought to be enforced by the summonses would be unreasonable as applied to temporary structures, and therefore bad.

The learned magistrate found on the facts that the premises which were in question were intended for and actually used as a temporary structure at Belvidere-road, on the date alleged in the summonses, and held as a matter of law that such temporary

(1) The letter of the 29th October, 1899, from Henry Mumford was as follows:—

DEAR SIR,—I called this morning to explain to you about a wooden hall temporarily erected in Belvidere-road, Drumcondra, as two officials called on me on Friday and Saturday. It is 65 feet by 21, and only there for two months for Temperance and Gospel Meetings in connection with the Irish Church Mission. We did not think it necessary to see or acquaint you of its erection, as it is so temporary and inside the hoarding, which will not be removed, and we have had it similarly erected before in Inchicore, Clontarf, Ranelagh, and Dolphin's Barn.

I am renting the plot from Shannon & Company, and Mr. Sheridan measured the ground for me. I enclose a photo of it, and remain, etc.,

HENRY MUMFORD.

S. HARTY, Esq. (City Engineer).

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premises did not constitute a building within the meaning of either sections 40 or 41 of the Act quoted. He further held that even if in point of law the word "building" included both temporary and permanent structures, the bye-laws of the Dublin Corporation relied on, however applicable to permanent structures, would be unreasonable, and therefore invalid, in respect to temporary structures such as that in question. He further added that it was not contended that the buildings in question were not otherwise within both the sections and bye-laws, and stated that, as the distinction between erections designed and used as temporary ones and those designed and used as permanent, appeared from the observations of Mr. Justice Byles in *Stevens* v. *Gourley* (1) to be the test of what is and what is not a "building" in the meaning of the sections quoted—citing also *Fielding* v. *Rhyl Commissioners* (2), and *Ballymena Commissioners* v. *M'Kay* (3)—he dismissed all three summonses, and now submitted this case for the opinion of the Court as to whether he was correct in point of law in his determination as aforesaid.

P. A. O'C. White and *O'Shaughnessy, Q.C.*, for the appellants.

Nov. 28.

Russell and *J. H. Campbell, Q.C.*, for the respondents.

The various bye-laws under discussion in the arguments are fully referred to in the judgments of the Court.

Cur. adv. vult.

BARTON, J.:—

It appears that in November last Mr. Mahony dismissed three summonses brought by the Dublin Corporation, against the defendants, the Irish Church Missions, the Reverend Philip Johnston, and Mr. Henry Mumford. These summonses were brought for breaches of the Irish Public Health Act, 1878, and of bye-laws made thereunder. Mr. Mahony dismissed these summonses, and at the request of the Dublin Corporation he has stated this case,

(1) 7 C. B. (N. S.) 99. (2) 3 C. P. D. 272. (3) 17 L. R. Ir. 605.

giving us the reasons of his decision, and asking us whether in point of law the ground of his decision was correct.

Much was said in the argument about the form in which this case has been stated. Seeing that it is stated in its present form, I think the proper course for this Court to take, if it happens to disagree with the magistrate, is to remit the case to the magistrate with the intimation of the opinion of the Court upon the point on which that opinion has been invited: per Hawkins, J. in *Meadows* v. *Taylor* (1); and, as I disagree with the magistrate with reference to one of these three summonses, I shall state my reasons, although, having regard to the opinion of the other members of the Court, those reasons will not prevail.

The defendants were charged on three summonses.

In the first they were charged with erecting a wooden building within the Urban Sanitary District of Dublin, contrary to the 8th bye-law of the Dublin Corporation—the 8th bye-law providing that all new buildings must be constructed of stone, brick, or other incombustible material. This bye-law was made by the Corporation in pursuance of section 41 of the Public Health Act, 1878, which enables Urban Sanitary Authorities to make bye-laws for a number of purposes, and among others, "for the prevention of fire and for purposes of health." The bye-law is in a common form, and may be found in bye-laws, local acts, or provisional orders, in the same words almost universally in the towns and cities of the kingdom. In fact it is perhaps one of the most elementary powers which modern civilization insists upon in the management of towns and cities, and which distinguish a modern from an old world city. In a second summons the defendants were charged with not having given notice of their intention to erect this building, or delivering plans and sections and a description of the materials of which it was to be built, contrary to Corporation bye-laws, No. 94, which requires these formalities in the case of all new buildings. The bye-law is made under another part of the same section which empowers the Corporation to require notices and plans and sections of new streets and buildings.

In a third summons the defendants were charged with

(1) 59 L. J. M. C. 99.

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bringing this building beyond the building line of the adjoining buildings of the street contrary to section 40 of the Public Health Act, 1878. As regards the third of these charges, I am of opinion that it was plainly unsustainable, and I will therefore dispose of it at the outset. The defendants admit that their building does extend beyond the building line of the street. But the 4th section of the Public Health Act does not apply in this case. It was held in England, under the corresponding section of the English Act of 1875, that this only applied to the alteration of existing houses and not to the erection of new buildings: *Williams* v. *Wallasey Local Board* (1). In consequence of that decision the law was altered in England, by 51 & 52 Vict. c. 52; but, as far as I know, the law remains unchanged in Ireland. I am, therefore, of opinion that the third summons was rightly dismissed, and I shall confine my attention to the two other charges under bye-laws 8 and 94, the first for building a wooden house within the city of Dublin, and the second for failing to serve notice of intention to build, and to lodge plans and sections and description of materials, with reference to which respectively different considerations, in my opinion, apply.

Now let us turn to the facts of the case. It appears that the defendants are the Irish Church Missions, the Reverend Philip Johnston and Mr. Henry Mumford. They are the owners of a wooden hall, 65 feet long by 21 feet wide, which they use for Temperance and Gospel meetings in connexion with the Irish Church Missions. It is composed entirely of wood, made up in sections which can be put together or taken down in a few days. This hall was, in October, 1899, erected on a vacant building site on Belvidere-road, which, as we all know, is a street of houses connecting Belvidere-place with Lower Dorset-street, near Mountjoy-square. The street is lined with houses on both sides, with a few vacant building sites, on one of which this hall was erected behind a hoarding, but projecting into the street beyond the front walls of the houses or buildings on either side. The wooden building had a stove and chimney.

Now let us pause at this point, so as to make it clear that,

(1) 16 Q. B. D. 718.

prima facie, this was an absolutely illegal structure. Indeed it was admitted, and cannot be contended that as a general rule the erection of such a building as this would be clearly and admittedly illegal. In the case of *Stevens* v. *Gourley* (1) a wooden portable shop 16 feet by 13 feet *i.e.* one-fourth the length, and not much more than one-half the width of this Mission Hall, was declared illegal on precisely similar words in the London Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122, s. 12, and Schedule 1). Chief Justice Erle, at p. 107, quoted the words of that Act, which are the very words of the 8th bye-law of the Dublin Corporation, and he says:—"That seems to me to be a distinct command to build the walls of incombustible materials, and a prohibition against building them of combustible materials." In the course of the argument in that case, at p. 104, Erle, C.J., pointed out that "there was nothing in the absence of foundation nor in the portability of the thing," and Mr. Justice Byles observed that there was no inconsistency in speaking of "a removable building," and, in his judgment at p. 112, he cites the case of a church, and says that a "church whether constructed of iron or wood" "was undoubtedly a building" within the meaning of the Act. Therefore, it is quite clear that unless this building can escape under some exemption, it is a class of building which, though quite permissible in the country, where it involves no danger, is prohibited in this and every other urban district in the kingdom.

With reference to these and similar provisions I would like to quote the words of Coleridge, C.J.:—"Men may build in the country as much as they like, but in towns, where considerations of health and other things have to be taken into account, there must be strong measures adopted for the purpose of compelling them to perform their statutory obligations": *James* v. *Wyvill* (2).

In order more clearly to illustrate the illegality of wooden buildings of this kind, I will refer to another, and I find it necessary to do so, because no case has yet arisen in Ireland upon this bye-law for the prevention of fire, and consequently, in the course of the argument, there seemed to be some tendency to minimise the seriousness of this bye-law which, in my opinion, is one of the

(1) 7 C. B. (N. S.) 99. (2) 51 L. T. (N. S.) 257.

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most vital and essential protections of urban life, and to suggest that the Corporation was inflicting a hardship, while, as I conceive, they were discharging an elementary duty. *Richardson* v. *Brown* (1) turned on similar provisions in a Local Provisional Order. The building in that case was made of wood 30 feet long and 18 feet wide. It was brought along the street on wheels, and placed at the corner of a new street on the freehold property of the defendant. It had spouts and a down corner, and was used as a butcher's shop. This building was just half the size of the Mission Hall, and in construing a bye-law for the prevention of fire, no distinction can be drawn between a mission house and a butcher's shop. The Court held that this structure was a building within the meaning of the sections and was illegal. In the course of his judgment Coleridge, C.J., said:—"The case of *Stevens* v. *Gourley* (2) is, in my opinion, directly in point. All the Judges there held that a wooden structure 16 feet by 13, resting on the ground, was a building within the meaning of the Metropolitan Building Act. We are bound by that decision, and we need not be astute to find out small points of difference between that case and the present. I agree specially in the view expressed by Byles, J., in that case, which is entirely in point in the present case."

Before leaving this point I will cite one of the few cases in which a wooden erection has been held not to be within the prohibition of these Acts, particularly as the reasons of the Judges are well worthy of being noticed. In *Slaughter* v. *The Mayor of Sunderland* (3) the Queen's Bench in England under the section of the English Public Health Act which corresponds to section 41 of the Irish Act of 1878 held that a "hoarding" was not a "building." The words of the Judges are instructive. Cave, J., pointed out that the "hoarding" had no walls, foundation, roof, or chimneys, and proceeded—"The whole sense of this rule, and in fact of all the rest of these rules, points to a building which, even if it be not a domestic structure, is, at least, to be a structure roofed in and capable of affording protection or shelter." Mr. Justice (now Lord Justice) Vaughan Williams said:—"The

(1) 49 J. P. 662. (2) 7 C. B. (N. S.) 99. (3) 60 L. J. M. C. 91.

following definition meets the case, 'Building' means a structure containing in its composition some feature contemplated by this bye-law. This advertising structure contains no such feature."

I think I have made it perfectly clear that buildings, in one case one-half the size of this building, and in another case one-fourth the size, have been declared illegal in England on the ground that they contravene this regulation against combustible buildings. Now I come to the grounds on which it is sought to distinguish this case.

From the correspondence and documents annexed to the case, it appears that on October 3rd the defendants applied to the agent for the lessor of these premises asking him to let them this vacant site *for three months* so as to place upon it this movable wooden hall, he adds:—"I shall be glad to hear from you as early as possible, as I have sites in view if I cannot have this." Accordingly, that day, October 3rd, the agent agreed in writing to let the plot for three months from October 7th, 1899, to January 7th, 1900. Shortly after the erection, the Corporation, hearing of it, sent two officials to make inquiries, upon which Mr. Mumford wrote to the City Engineer explaining that he had not thought it necessary to acquaint him of the erection, as it was temporary and inside the hoarding which was not to be removed, and adding "We have had it similarly erected before in Inchicore, Clontarf, Ranelagh, and Dolphin's Barn." So that the user of this wooden hall appears to be that it goes about the city on a sort of circuit, resting three months in one site, and then looking round for another scene of operations. I would infer that it had been about fifteen months in this way in or about the city of Dublin. However, I shall only deal with it in connexion with the three months location at Belvidere-road. The Corporation law agent replied on October 26th, pointing out the breaches of the bye-laws on which the Corporation relied, and adding—"I regret having to take those proceedings against a religious organization; but under the circumstances I have no choice, as you persist in the violation of the law."

On these facts the magistrate rests his dismissal of these summonses. It would seem to me from the form of the case that Mr. Mahony felt himself bound by the authorities to which he

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refers to hold as a matter of law that by reason of the temporary character of this erection, it could not be a building within the meaning of the Act and these bye-laws, in other words that a building, although otherwise within the Act, was necessarily excluded from the Act if it was erected for so brief a period as three months. This view of the law might certainly involve a very serious and strange consequence. A tenement house, a workshop, a public building, which would otherwise be subject to municipal regulations for prevention of fire or disease would, if erected for three months, be free from all control. Yet three months seems to me a considerable time, certainly quite long enough to cause a conflagration or an epidemic. It was suggested in argument that the shorter the tenure the less must be the risk. On the other hand, it may be said the shorter the tenure the less sense is there of responsibility, and the less motive for caution, and, consequently, the more the danger to neighbours and the general public.

The magistrate refers to three cases; the first of these is *Stevens* v. *Gourley* (1), to which I have already referred. There are some expressions in the judgment of Crowder, J., in that case which are capable of being misunderstood, but I can find nothing in the judgment of Byles, J., which, as I have pointed out, is of especial authority, which would not be applicable to the building in the present case. Every word of his judgment seems applicable to the present case. He speaks of that building of 16 feet by 13 as being of considerable size. This mission house is four times as long and nearly twice as wide as the building in that case. He says it should be "intended to be permanent or at least to endure for a considerable time." This mission house was in one view intended to be permanent, because it was put up in place after place in different parts of the city. But at all events it was to remain on this site for a considerable time, because three months is time enough to cause a fire in the case of combustible buildings or an epidemic in case of unsanitary buildings.

The second case to which the magistrate refers is *Fielding* v. *Rhyl Improvement Commissioners* (1). I gather that it was the case which was most relied on before the magistrate as it was

(1) 7 C. B. (N. S.) 99. (2) 3 C. P. D. 272.

here. In that case two structures were held not to be buildings within the meaning of a local bye-law. These structures were a two-roomed workmen's tool-house for the convenience of workmen during the building of some cottages, and a square enclosure of walls for the purpose of a brick-kiln. Both were intended to be pulled down upon the completion of the cottages. Now that case was distinguishable from this both in respect of the bye-law under which it was brought and the nature of the structure with which it was concerned. The bye-law in that case was not for the prevention of fire. The question of combustibility did not arise. The structures were of brick and mortar, and were perfectly legal buildings, and the proceedings were not taken, as they have been in this case, for the prevention of fire or under any bye-laws requiring buildings to be made of incombustible materials. I lay special stress on this point, because it is on the applicability of that to the present case that I differ from the magistrate and from the majority in this Court. That was a wholly different case from this. This is a case of wooden building, and the summons is under a bye-law prohibiting combustible structures. That was a case of two incombustible buildings, one a stone-built workmen's toolhouse, erected pending the building of some cottages, and the other a brick-kiln, both of which structures were to be pulled down on the completion of the cottages. The summons in that case was for not lodging plans and sections of these buildings, and the Court held that it was unreasonable to require plans and sections of temporary buildings such as these were. To require plans and sections of a workman's tool-house and brick-kiln is on the face of it absurd and unreasonable. Such buildings are not within the reasonable scope of a bye-law requiring plans and sections which naturally relate to the laying out of permanent buildings so as to secure regularity and conformity. That decision must be confined to its subject-matter. Because a Court has decided that it is unreasonable to require plans and sections of a temporary building, is that any reason why temporary buildings are to be exempted from all municipal bye-laws, and a free hand be given to every one to expose his fellow-citizens to the risk of fire and pestilence, provided he only does so for three months at one time in one spot? On the authority of that case I am prepared to agree

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with my colleagues that the second summons in this case was rightly dismissed, because it required, *inter alia*, plans and sections of a temporary building, which may be considered an unreasonable requirement. But I cannot see how that case applies to the 8th bye-law. Temporary buildings may be more dangerous than permanent ones from the point of view of fire, because their owners are likely to have less sense of responsibility and less motive for caution.

The same observation applies to the third case referred to by Mr. Mahony, the *Ballymena Commissioners* v. *M'Kay* (1). In that case the Ballymena Commissioners sought from the Vice-Chancellor an injunction to remove certain buildings made in contravention of a bye-law requiring notice of the erection of buildings, with plans and scales and lines of drainage. The Vice-Chancellor granted the injunction. The case is relied on by the defendants here, because there were some references in the argument and judgment to the question of permanence. But that was not a case of an unsanitary or combustible building, and I can find nothing in the Vice-Chancellor's judgment to sanction this rule of a three months' statute of limitation in aid of conflagrations and epidemics. I may add, as is pointed out in the argument of Serjeant Jellett in that case, that the 41st section of the Irish Public Health Act is wider in its terms than the corresponding section of the English Act, and it is suggested that this change of phraseology was made in consequence of the English decision in the case of *Fielding* v. *Rhyl Commissioners* (2).

These are the three cases to which the magistrate referred. The two latter cases have no reference to this question of wooden buildings at all, and the case of *Stevens* v. *Gourley* (3), which does refer to a wooden building, does not, in my opinion, support the proposition that temporary buildings of this kind are exempted from the bye-law.

I understand that the other members of the Court lay stress on the fact that a number of these bye-laws are inapplicable to buildings like this, and that they are of opinion that if a building is not within the reasonable scope of one bye-law, it is necessarily

(1) 17 L. R. Ir. 605. (2) 3 C. P. D. 278. (3) 7 C. B. (N. S.) 99.

outside the others. I dissent entirely from this opinion. Many of these bye-laws, as might be expected, can only be reasonably applied to dwelling-houses, which are, of course, the most common form of urban buildings. It naturally occurs that hardly any of them seem applicable to wooden buildings, because wooden buildings are prohibited in this 8th bye-law, and the other bye-laws are not likely to be appropriate to a prohibited building. If a building is within the scope of the parent Act it may, in my opinion, be within the reasonable scope of one bye-law and not of another.

It might be argued that this bye-law is unreasonable, because it is too absolute, because in fact it practically forbids combustible houses instead of regulating them. But this matter was considered by the Privy Council in the case of *Slattery* v. *Naylor* (1). In that case there was a bye-law of a New South Wales borough forbidding interment in any existing or future cemetery within 100 yards of any place in the borough. The result was to close existing cemeteries and take away private rights, and the matter was the subject of the Privy Council appeal. Lord Hobhouse delivered the judgment of the Privy Council, and discussed the question whether, and in what cases, municipal bye-laws might not merely regulate, but altogether prevent, a particular form of freedom of action or enjoyment of property. He says (p. 449):—"It is difficult to see how the Council can make efficient bye-laws for such objects as *preventing fires* and providing for the general health, not to mention others, unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property. The interment of the dead is one of those affairs in which it would be likely to occur that no regulations would meet the case except one which wholly prevented the desired or accustomed use of the property." In these words we have very high authority for maintaining an absolute and stringent bye-law, such as this for the prevention of fire.

This prohibition of combustible buildings has always existed in the London Acts, and is contained in the London Building Act, 1894 (57 & 58 Vict. c. cxiii., local and personal; see

(1) 13 A. C. 446.

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section 53, Schedule, rule 1). Under section 84 there is a special power given to the London officials of granting licences for the erection of wooden structures which are not to be erected without the licence of the local authorities. One exception is made, namely, "wooden structures of a movable and temporary character erected for a builder for his use during the construction, alteration, or repair of any building," etc. From these words I infer that all other temporary wooden buildings are prohibited, else why mention this special kind of temporary buildings. These special powers in London are treated in the authorities as in *pari materia* with the Public Health Act, and with the case of *Stevens* v. *Gourley* (5). It is only natural that the local authorities of a great city like London should get more elastic powers than other places. But I cannot believe that the Legislature intended to place all other urban districts in England, Wales, and Ireland at the absolute mercy of this vagrant class of wooden building. I am confirmed in this view by reference to the common form of bye-laws for English local authorities. I find in Lumley, on Bye-laws, that the English Local Government Board issued a model set of bye-laws under the Public Health Act which they recommend for adoption by local bodies. One of these relating to new streets and buildings is No. 11 (at p. 347). It is identical with this 8th bye-law, which we are concerned with in this case, requiring all buildings to be constructed of incombustible materials. The 2nd bye-law contains a list of exempted buildings, and one of these exempted buildings is a temporary hospital for infectious disorders, probably because it is specially provided for by another Act. This appears to me to indicate that other temporary buildings are not, according to the view of the Local Government Board (England), and according to the English practice, necessarily excluded from these bye-laws.

This case does not merely affect the question of danger from fire, and the power and responsibility of the Corporation in that respect. One of these very Dublin Corporation bye-laws (No. 92) is the bye-law under which the Corporation have power to close buildings unfit for habitation. I am afraid that this decision

(1) 7 C. B. (N. S.) 99.

must apply to it, because the two subjects, prevention of fire, and purposes of health, are coupled together in the enabling section of the Act. They go hand in hand, and no distinction can be drawn. It is a serious thing to say that any house, however pestilential, however unfit for habitation, however deadly a source of danger to its inhabitants, or to the district, is free to spread disease and death in any part of the city of Dublin, so long as its proprietors intend to keep it in one place for a term not exceeding three months.

In my opinion Mr. Mahony has made the mistake of inferring from authorities which relate to special bye-laws, that there is a general hard and fast rule that all temporary buildings are excluded from the Corporation bye-laws under the Public Health Act. In my opinion there is no such hard and fast rule. Wherever a bye-law plainly contemplates only permanent buildings, then of course it is unreasonable to apply it to temporary buildings. On that ground I am prepared to agree with the other members of the Court that the summons for not lodging plans and sections was rightly dismissed. But in so far as temporary buildings are within the distinct contemplation of any of these bye-laws, the bye-laws apply to them, and ought to be enforced against them; and in bye-laws relating to health and the prevention of fire, the fact that a building is temporary may possibly, under some circumstances, aggravate rather than decrease the dangers and mischief.

This particular case has only an academic interest. At the end of the three months this building was removed to be erected elsewhere. But the case is one of great importance to the Corporation and the citizens. In this case the building happens to be a building whose purposes are religious. In another case it might be a three months' tenement or lodging house, or a building erected for some undesirable or evil purpose. These considerations are quite irrelevant. The safety and health of the city generally are the objects of these statutory provisions, and they are applicable to all structures which come within their scope, whatever be their character or purpose.

From all these considerations I infer that there is no general rule that temporary structures, such as those which are the subject of this case, are necessarily excluded from these bye-laws. The

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permanent or temporary nature of the building is one of the circumstances to be considered, together with all the other circumstances of each case. The question in every case seems to be whether, under all the circumstances, the structure in question in each particular case comes within the reasonable intention, scope, contemplation, or mischief, of the Act and bye-law. With this opinion I think we ought to refer back the case to Mr. Mahony.

BOYD, J.:—

Three summonses were issued against the defendants at the suit of the Corporation of Dublin, as the Urban Sanitary Authority of Dublin. In the first, it was complained that the defendants had in October, 1899, commenced the erection of a building, constructed almost entirely of wood, situate at Belvidere-road, in the district of Dublin, to which the bye-laws in that behalf of the Corporation related, without having given notice of such intended erection to the complainants as such sanitary authority, or delivered any plans and sections of such building, nor any description in writing of the materials of which it was intended that such building should be erected, as required by the said bye-laws. In the second, the complaint was that the defendants erected a new building, constructed almost entirely of wood, to which the said bye-laws in that behalf related, which was not enclosed with walls of hard and incombustible material as required by the said bye-laws; and in the third summons, it was complained that the defendants erected a house or building, forming part of the said street, beyond the front of the house or building on either side of the same, without the written consent of the urban sanitary authority.

These summonses came before Mr. Mahony, one of the Divisional Magistrates, on the 1st of November, 1899, and were finally heard by him on the 8th of November, 1899; and he dismissed all of them. At the request of the Corporation, he has stated a special case for the decision of this Court, as to whether he was right in point of law in so determining.

It is necessary for this Court to consider, first, what was the evidence given before Mr. Mahony; secondly, what has he

decided as matters of fact, and thirdly, what has he decided as matters of law.

The first and only witness for the complainants was Mr. Walter Butler, their building surveyor. He stated that he had seen the building during its erection, that it was composed entirely of wood and made up in sections, which could be put together or taken down in a few days, and that he had been informed it was only erected for a few months. The bye-laws of the Corporation were given in evidence. For the defendants, Mr. Henry Mumford stated that he admitted his letter to Mr. Harty, dated 23rd October, 1899, enclosing a photograph of the erection complained of, and he produced the agreement under which the premises were held upon which the building was erected, by which it appeared that the site was to be vacated on or before January 7th, 1900. He further gave evidence that the shed has no foundation, and has a canvas roof, that he brought the structure about from place to place, and that he had to remove it from where it was by January 7th. The letter of this witness, dated the 23rd October, 1899, to Mr. Harty, the City Engineer, which was admitted by him and given in evidence, is as follows:—"I called this morning to explain to you about a wooden hall, temporarily erected in Belvidere-road, Drumcondra, as two officials called on me on Friday and Saturday. It is 65 feet by 21, and only there for two months for temperance and Gospel Meetings in connexion with the Irish Church Missions. We did not think it necessary to see or acquaint you of its erection, as it is so temporary, and inside the hoarding which will not be removed, and we have had it similarly erected before in Inchicore, Clontarf, Ranelagh, and Dolphin's Barn. I am renting the plot from Shannon & Company, and Mr. Sheridan measured the ground for me. I enclose a photo of it."

On this evidence, Mr. Mahony found, as a fact, that the premises in question were intended for, and actually used as a temporary structure on the date alleged in the summons, and he held, as a matter of law, that such temporary premises did not constitute a building within the meaning of either sections 40 or 41 of the Statute, 41 & 42 Vict. c. 52. He further held that even if, in point of law, the word "building" included both

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temporary and permanent structures, the bye-laws of the Dublin Corporation relied on, however applicable to permanent structures, would be unreasonable, and therefore invalid, in respect of temporary structures such as that in question.

I take it that what the magistrate has found is that, as a fact, the erection was of a temporary character, for temporary use, and erected on a plot of ground only taken for a short period. We are not asked in the special case, nor have we any right, to review his findings of fact. Of these he is the sole judge: *Newman* v. *Baker* (1), *Maude* v. *The Baildon Local Board* (2), *Corporation of Leicester* v. *Brown* (3), *Warren* v. *Mustard* (4).

The question submitted by the special case for our consideration, is whether Mr. Mahony was correct in his determination of the point of law, that temporary structures for temporary use are not within the statute, and that the bye-laws are not applicable to such buildings; and these are the only points for our determination.

Now as to the question whether a building of such a character as the magistrate has found this to be, is within the provisions of the Public Health Acts. I am of opinion that it is not.

The Public Health Act of 1878 (41 & 42 Vict. c. 52), by sections 38 to 43, provides as to the regulation of buildings within the districts over which urban authorities shall have jurisdiction, and by section 41, enables sanitary authorities to make bye-laws with respect to 1, "the level, width, and construction of new streets, and the provisions for the sewerage thereof"; also 2, "with respect to the structure and description and quality of the substances used in the construction of new buildings for securing stability, and for the prevention of fires, and for purposes of health," and also 3, "with respect to the sites of houses, buildings, ond other erections, and the mode in which, and the materials with which, such foundations and sites shall be made, formed, excavated, filled up, prepared and completed, for securing stability, the prevention of fires, and for purposes of health"; and "the term '*foundations*' shall

(1) 8 C. B. (N. S.) 200.
(2) 10 Q. B. D. 394.
(3) 62 L. J. M. C. 22.
(4) 61 L. J. M. C. 18.

mean the space immediately beneath the footings of a wall, and the term '*site*,' in relation to a house, building, or other erection, shall mean the whole space to be occupied by such house, building, or other erection, between the level of the bottom of the foundations, and the level of the base of the walls." The section also, by sub-section 4, enables the sanitary authority to make bye-laws "with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings"; and by sub-section 5, with respect to the drainage of buildings, to water-closets, earth-closets, privies, ash-pits, and cesspools in connexion with buildings, and with respect to the closing of buildings unfit for human habitation, and the prohibition of their use for such habitation; and the section further enables the sanitary authority to provide for the observance of such bye-laws, by inserting therein such provisions as they think necessary as to notices, the deposit of plans and sections, inspection, and the removal of work begun or done in contravention of such bye-laws.

The summonses in this case have been issued under the provisions of section 40 and 41. I think it is manifest, from the various provisions of these sections, that the buildings and erections to which these provisions are intended to apply, are buildings of a permanent character, and such as are meant to form part of the street, and they do not apply to a building of such a class or character as the magistrate has found that complained of in this case to be. The word "erections" is only used in section 41, s.-s. (3), and then only in connexion with sites and foundations, and the term "foundations" is defined as "the space immediately beneath the footings of a wall," and the term "site," as the space to be occupied "between the level of the bottom of the foundations and the level of the base of the walls." In the bye-laws of the Dublin Corporation, "footings" are defined as "the course or courses of stone or brickwork laid on foundations, whether natural or artificial." These terms, so defined, cannot apply to a building or erection such as that to which this case has reference. No definition of the term "footings" is given in the Act, and I only refer to the definition in the bye-law, as it merely expresses the ordinary meaning of the term.

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I think that, in ascertaining what was the character of the buildings contemplated in the sections of the Public Health (Ireland) Act, 1878, to which I have referred, considerable light may be derived from sections 39 and 43.

Section 39 provides that, when any house or building situated in any street, or the front thereof, has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which the house or building, or the front thereof, to be built or rebuilt in the same situation, shall be erected. This section thus gives the urban authority, in the case *of old buildings*, power to alter the line of buildings.

Section 40 enacts that it shall not be lawful, without the consent of the urban authority, "to bring forward any house or building *forming part of any street*," nor to build an addition thereto beyond the front of the house or building on either side thereof. The buildings referred to in these two sections are old buildings of a permanent character.

One of the summonses in this case is brought under the 40th section, but this section clearly cannot apply to the building complained of, for it can only be considered a new building.

Section 41 deals with *new buildings*, and gives power to the sanitary authority to make bye-laws in reference thereto as to certain specified matters, viz. as to new streets and the sewerage thereof, and as to the structure and description and quality of the substances used in the construction of new buildings for securing stability and the prevention of fires, and for purposes of health, and as to the sites of houses, buildings, and other erections, and the mode in which, and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared and completed, for securing stability, the prevention of fires, and for purposes of health. I am of opinion that the new buildings referred to in this section must be taken to be buildings of the same character as the old buildings referred to in the preceding sections, viz. buildings of a permanent character forming part of any street.

Section 43, also to my mind, shows that buildings of a merely temporary character were not intended to be within the scope of the Act.

In *Stevens* v. *Gourley* (1), it was decided that the structure in that case being of wood, was a violation of the Act 18 & 19 Vict. c. 122 (The Metropolitan Building Act), which provided that every building should be constructed of incombustible substances; but the Judges who so decided, based their judgment on the fact that the building was *permanently* built, and reasonably calculated for the use of man, and therefore was a building within the intention and scope of the Act. The building in this case has been decided by the competent tribunal, the magistrate, not to be of that character.

Besides, this case arises under the Public Health Act, and not under a Building Act, passed for the express purpose of regulating the construction of buildings in London, and the prevention of danger to the inhabitants, by fire or otherwise. The object of the Public Health Act is quite different, for it was passed principally for the purpose of enforcing proper sanitary arrangements in the construction of buildings of a permanent character.

In section 41, sub-section 2, the sanitary authority is authorised to make bye-laws with respect to new buildings "for securing stability and the prevention of fires, and for purposes of health," and in sub-section 3, with respect to "sites of houses, buildings, and other erections" . . . "for securing stability, the prevention of fires, and for purposes of health." The word "stability," being used in connexion with the other words, shows the permanent character of the works to which the other provisions are intended to apply.

In *Fielding* v. *Rhyl Improvement Commissioners* (2), the very same provisions applied to the buildings there in question; but the Court decided that temporary buildings were not contemplated, and that, if the bye-laws could be held to apply to such buildings, they would have been unreasonable and absurd. To the same effect are the decisions in *London County Council* v. *Pearce* (3), *London County Council* v. *Humphreys* (4); and *Hall* v. *Smallpiece* (5).

(1) 7 C. B. (N. S.) 99.
(2) 3 C. P. D. 272.
(3) [1892] 2 Q. B. 109.
(4) [1894] 2 Q. B. 755.
(5) 59 L. J. M. C. 97.

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In *Richardson* v. *Brown* (1), it was held that a butcher's shop constructed of wood, and on wheels, was not a mere temporary building, as it was intended for use as a shop in the street in which it was placed. In *The Ballymena Township Commissioners* v. *M'Kay* (2), the Vice-Chancellor on a review of the evidence as to the nature and character of the building, came to the conclusion it was not temporary, and granted an injunction. These cases all show that a mere temporary building did not come within the provisions of the statutes or bye-laws applicable in each instance, and are authorities in point in the present case.

Though the English Public Health Act, and the Metropolitan Building Acts contain substantially similar provisions to those in the Irish Public Health Act, it was considered necessary to include in the Metropolis Management Amendment Act of 1882 (45 & 46 Vict. c. 14) a section (s. 13), making express provisions applicable to the erection of "any wooden structure or erection of a moveable or temporary character." This would have been unnecessary, if temporary wooden buildings were to be considered within the scope of the previous Acts. Also in the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), sections 82, 83, and 84, express provision is made as to "temporary buildings and wooden structures."

My brother Barton, in the judgment he has just delivered, appears to have arrived at his decision on the ground that the building in this case was constructed of wood, was of an inflammable character, and thus was dangerous, and also he refers to the want of sanitary arrangements, though there is no complaint on that ground. In the case of *The London County Council* v. *Humphreys* (3), the argument as to the danger of fire from a wooden building was disregarded, as it was considered that a large wooden bungalow, though erected within the London district, was not within the Act: as, being only erected for purposes of sale and not for occupation, it was therefore not within the provisions of the Act.

Two of the summonses in this case are framed under the bye-laws made by the Corporation under the provisions of the Act.

(1) 49 J. P. 661. (2) 17 L. R. Ir. 605. (3) [1894] 2 Q. B. 755.

I adopt the language of Lindley, J., in *Fielding* v. *Rhyl Improvement Commissioners* (1), "I should have thought the bye-law unreasonable and absurd," if it were intended to apply to such a structure as the one in question in this case.

I think the bye-laws are applicable to permanent buildings, and were not intended to apply to a building such as the magistrate has found the building in question to be. When the bye-laws are carefully considered, it will be found that they are only applicable to such buildings as are intended to form part of a street. Number 8, provides that *all new buildings* shall be constructed of stone, brick, or *other incombustible materials, properly bonded and solidly put together*, (*a*), with good mortar, (*b*), with good cement, or (*c*), with good cement, mixed with clean sharp sand. How can these provisions apply to a temporary wooden building. Again, in Nos. 17, 18, and 19, bricks, or suitable stone, or other blocks of hard incombustible substance, clearly cannot apply to wooden buildings, though in all these bye-laws, incombustible substance is mentioned. There are numerous other bye-laws, wholly inapplicable to wooden buildings; but I expressly refer to those I have mentioned, because in them alone is incombustible substance alluded to. Had they been intended to apply to wooden buildings, why are they not expressly mentioned as in the Metropolis Management Amendment Acts of 1882 and of 1894 ?

If it were to be held that wooden buildings of a temporary character are within the Act and bye-laws, it would have the effect of necessitating the removal of structures now in existence in the city; and the urban authority, not having powers conferred on them of permitting their erection, none others of a like character could be erected. I refer among others to cab-men's shelters, coffee stands, newspaper kiosks, sheds for builders' workmen, temporary hospitals, and numerous erections of a similar character.

On a careful consideration of the whole case, I am of opinion that the decision of the magistrate was right, and that the question submitted for our judgment should be answered in the affirmative.

(1) 3 C. P. D. 272.

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LORD O'BRIEN, L.C.J.:—

After much careful consideration and some fluctuation of opinion, I have come to the conclusion that the Divisional Magistrate, Mr. Mahony, having regard to the conclusion of fact at which he arrived—that the building under consideration was of a temporary character—was right in dismissing the summons. Before I refer to the grounds on which my opinion rests, I think it right to say that it appears that there is no foundation whatever for the suggestion that the Corporation was influenced in this prosecution by any improper motive. The suggestion that they were influenced by some unworthy bias against the Irish Church Missions is, in my opinion, wholly without foundation. The case was a most proper one to bring forward; it is by no means free from difficulty; and the fact that my brother Barton differs from the other members of the Court indicates the difficulty of the question we have to solve. My brother Barton has delivered an attractive judgment, but not so attractive as to draw me away from the conclusion at which I have arrived. I have said that the attitude of the Corporation is entirely free from all impeachment. I must say the same also of the Irish Church Missions. Mr. Mumford has acted with absolute propriety, and has candidly stated the facts as they are.

I now turn to the dry legal question before us. It is this, is a structure, of a temporary character, designed and used as such, obnoxious to the provisions of the Public Health Act, 1878, and to the bye-laws of the Dublin Corporation made pursuant to those provisions? My answer to that question is, No, by reason of the temporary character of the structure. The Public Health Act and the bye-laws of the Corporation, in my opinion, deal with buildings of a permanent, and not of a temporary, character. This appears to me to be plain from a consideration of the policy of the Act and an examination of its provisions; and section 41 especially strongly supports this view. By that section every sanitary authority is empowered to make bye-laws "with respect to the level, width and construction of new streets . . . and the sewerage thereof," and with respect to the "structure and description and quality of the substances used in the construction of new buildings, for securing stability and the prevention of fires, and for purposes

of health," and with respect to "the sites of houses, buildings, and other erections," and the mode in which, and the "materials with which, such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed, for securing stability, the prevention of fires, and for purposes of health." The section further defines *foundations* as "the space immediately beneath the footings of a wall," and it defines "site," "in relation to a house, building, or other erection," as "the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." It also authorises the making of bye-laws "with respect to the drainage of buildings," and also with regard to "the deposit of plans and sections by persons intending to lay out streets or to construct buildings."

These provisions, to my mind, contemplate buildings of a permanent character.

I next turn to the bye-laws made under this section. The 8th bye-law provides, that "every person who shall erect a new building" shall cause it "to be enclosed with walls constructed of good bricks, stone, or other hard or other incombustible materials, properly bonded and solidly put together," with good mortar or cement. Bye-law 9 provides that, in all new buildings, party walls shall be made of good bricks, stone, or other hard and incombustible materials. Bye-law No. 12 provides that the walls of every new building shall be constructed "so as to rest upon proper footings, unless it have a level bed of natural rock." That bye-law, and the ones that follow it, make further provision in regard to the "foundations" of all new buildings; and bye-laws 17 and 18 provide for the minimum thickness of walls in new buildings; and direct that they shall be made "of good bricks, not less than 8 inches long, or of suitable stone or other blocks of hard and incombustible substance, the beds or courses being horizontal. Bye-law 22 provides, in the case of new buildings, that "parapet walls" must be erected in certain cases. Bye-laws 64 to 70 deal with the drainage of new buildings, bye-law 64 providing that every person who erects a new building "shall cause the subsoil of the site of such building to be effectually drained by

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means of suitable earthenware field pipes," and directs that such person shall not lay any such pipe in such a position as to communicate with any sewer or cess-pool, or with any drain constructed to be used for conveying sewage. Bye-law 94 provides that every person who shall intend to erect a building shall give notice to the sanitary authority and deliver to the Town Clerk plans and sections of every floor of such intended building, and shall send a description in writing of the materials of which it is intended that such building shall be constructed and of the intended mode of drainage and means of water supply, and shall send a block plan of the proposed building showing the intended line of drainage of such building. Bye-law 95 provides that no works to which these bye-laws relate shall be commenced until notice of approval by the sanitary authority has been received by the person laying out a street or constructing a building of any description to which these bye-laws relate.

Thus we find a series of the most elaborate and detailed requirements as to new buildings of various descriptions, dwelling-houses, public buildings, warehouses, etc., but, evidently, in all cases, structures which, it was contemplated, should form part of a street—structures having that element of permanence which is to be found in houses forming part of the line of a street. On the other hand, many of the provisions to which I have referred would appear to me to be most unreasonable if they were applied to all buildings of a temporary character.

My opinion fluctuated during the argument, but, when I considered the matter afterwards, I was forced to the conclusion that we should adopt the view presented by Mr. Campbell.

The case of *Stevens* v. *Gourley* (1) was strongly pressed upon us. That was an action for work done under a contract, and it was there held that the plaintiff was not entitled to recover, because the building erected under the contract contravened certain of the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 123. It was held there that a structure of wood of considerable size, 16 by 13 feet, and intended to be permanently used as a shop, was

(1) 7 C. B. (N. S.) 99.

a building within that Act, although the sides were not let into the ground, but merely rested upon timbers upon the surface. The provision there contravened was that "every building shall be enclosed with walls constructed with brick, stone, or other hard and incombustible substances," and that "the foundations shall rest on solid ground or upon concrete or upon other solid sub-structure." Erle, C.J., there held that the structure was intended for a house or shop, that it was permanently built, and therefore was a violation of the statute; and Crowder, J., in giving judgment, said:—"It appears to me to have been still the intention of the parties to erect a *permanent* structure, and it is with reference to its being a permanent structure that I come to the conclusion that it is a 'building' within the meaning of the statute . . . Upon the whole, and mainly on the ground that this was a structure of some considerable magnitude, and erected for use as a shop, and substantially put together, and for a permanent purpose, I am clearly of opinion that it is a building within the meaning of the Act."

It seems to me that it is involved in this decision that a building not of a permanent character, but intended merely to be used temporarily, would have been outside the provisions of the Metropolitan Building Act, the words of which are identical with the words of the bye-laws here in question.

I next turn to *Fielding* v. *Rhyl Improvement Commissioners* (1). There, under a local Act incorporating the provisions of the Public Health Acts, 1848 and 1858, bye-laws were made, by which it was amongst other things provided that "every person who shall intend to erect any new building shall give a week's notice to the town surveyor of such intention, by writing, delivered to the surveyor or left at his office, and shall at the same time leave at the office detail plans and sections of every floor of such intended new building," etc., and a penalty not exceeding £5 was imposed for non-compliance with this requirement. The appellant, without giving such notice, or delivering any plans, erected certain structures, which, from their description, could not be intended for residential purposes, and which were found by the Justices, upon

(1) 3 C. P. D. 272.

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a case stated under 20 & 21 Vict. c. 43, to have been erected for a temporary purpose only, and to have been intended to be pulled down by the appellant when that purpose was answered; and it was held that a conviction under the above-mentioned bye-laws could not be sustained, inasmuch as such bye-laws, if intended to apply to such structures, were unreasonable and bad.

Lord Denman, in giving judgment in that case, says:—

"As to the other structure a more difficult question arises. It is described as a structure built with nine-inch walls, and containing two rooms, one of which had a fire-place and chimney. Then the statement goes on as to both. The appellant had in contemplation the building of a number of cottages in the immediate neighbourhood of such structures; and the first-mentioned structure was for the storing of tools and general convenience of the workmen proposed to be employed in the erection of such cottages; the other being for the purpose of a brick-kiln. Both structures were intended to be pulled down by the appellant upon the completion of the cottages in question. It is not suggested that any one was to live there, and inferentially it is shown that they are mere temporary structures. That being so, it seems to me that it would be absurd to hold these things to be buildings within the meaning of the bye-law, so as to be prohibited from being erected without notice and the sending in of detail plans and sections, and the other formalities referred to. I therefore think the Justices were wrong in holding these structures to be buildings within the bye-laws relied on; and that, if they could be so held, the bye-laws would have been unreasonable. We are bound to read them so as to make their provisions reasonable and consistent."

Lord Justice Lindley (then Lindley, J.) said that he was of the same opinion; that, as both structures were intended to be pulled down upon the completion of the cottages, he could not read the bye-law as applicable to them. The bye-law there under consideration was headed, "As to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or construct buildings, as to inspection by the town surveyor," etc. He continues—"If I had come to the opposite conclusion I should have thought the bye-law unreasonable and absurd. As applicable to buildings of a permanent character and

to be used for the purpose of dwelling houses, it is a perfectly reasonable bye-law. . . . It is enough to say that as applicable to structures such as described it is not a reasonable bye-law."

Richardson v. *Brown* (1) was referred to, but it seems to me to have no bearing upon the present case. The question which apparently was decided there was that a structure upon wheels could be a building. It was used as a shop, and was held to be a shop, and intended to be permanently so used, and it was upon that ground that the decision went.

I think we should be disregarding the decisions in *Stevens* v. *Gourley* (2), and in *Fielding's Case* (3), if, upon the exactly similar words of the bye-laws we have here to consider, we were to decide that they applied to a temporary structure such as the present. It struck me during the course of the argument that buildings of a temporary character might perhaps come within the policy of the Act, in this way, that their sanitary condition, and the danger that might arise from fire, were matters which had to be provided for. However, I am satisfied that the true construction both of the Act itself, and of the bye-laws, points altogether to permanent buildings, and that, so far as purposes of public health are concerned, a great number of the sanitary regulations applicable to permanent structures would be, to a great extent, inapplicable in cases of temporary buildings; and, as to the risk of fire, that must exist of course, but the risk is very small comparatively.

I have given the case every consideration as its magnitude deserved, and, for the reasons I have stated, I think that the Divisional Magistrate was correct in his decision.

I must say that it appears to me that there is not a shadow of foundation for saying that the Irish Church Missions sought to evade the Act of Parliament. They simply erected a temporary building which might be taken down in one place when the mission had concluded, and be erected in another, where it was intended that the mission should begin. The argument for the prosecution would lead to the conclusion that in all cases, no matter what the buildings, whether temporary or permanent, there should be a

(1) 49 J. P. 661. (2) 7 C. B. (N. S.) 99. (2) 3 C. P. D. 272.

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rigid compliance with all the requirements of these bye-laws, a conclusion which would appear to me to be very unreasonable.

Solicitor for the appellants: *Bonass.*
Solicitor for the respondents: *Shannon.*

A. E. R. J.

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May 11. June 16.

LLOYD *v.* KEYS (1).

Landlord and tenant—Ejectment for non-payment of rent—"Rent"—Lease reserving two annual "rents" out of the same holding—Year's rent in arrear—Landlord and Tenant (Ireland) Act, 1860, *sects.* 1, 52.

By lease dated 1879, reciting that L. (the lessor) had erected a dwelling-house, &c., on the premises demised, out of moneys (£896 6*s.* 6*d.*) advanced by the Board of Works, L. demised the lands in question for a term of sixty years to K., "yielding and paying therefor and thereout the yearly rent or sum of £13 2*s.*" (over and above taxes) "and also yielding and paying as long as any sum should remain due on foot or in respect of the said loan of £896 6*d.* 6*d.*, the further yearly annual sum of £44 16*s.* 4*d.*, or such other annual sum" as might be payable in respect of same, "the said yearly rents to be payable" every 1st November and 1st May. The terminable annuity payable to the Board of Works was, in 1889, reduced to £35 17*s.* In 1899 the plaintiff issued a civil bill ejectment for non-payment of rent, there being then no arrears due in respect of the Board of Works' charge, but there being due to the plaintiff a sum of £21 13*s.* 8*d.* in respect of the rent of £13 2*s.* On case stated by the Judge of Assize:—

Held, that upon the true construction of the lease, the "rent" of the holding, within the Landlord and Tenant Act, 1860, sect. 1, was the aggregate of the two annual sums, viz. the £35 17*s.* and the £13 2*s*; and that, there not being a year's rent in arrear within sect. 52 of that Act, the plaintiff could not succeed.

Semble, even if each sum could be regarded as a distinct rent-service, sect. 52 would not enable an ejectment to be brought in respect of each such rent.

CASE STATED for the opinion of the Queen's Bench Division by Palles, C.B., at the Spring Assizes, 1900, for the county of

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

Limerick, upon an appeal from a decree for possession granted by the County Court Judge in a civil bill ejectment for non-payment of rent.

By lease dated the 10th October, 1879, and made between Rickard E. Lloyd of the one part, and William Keys of the other part—reciting that a dwelling-house and buildings had been erected on the lands by said lease demised, and that £896 6*s.* 6*d.* of the expenditure on said house has been contributed by the lessor out of moneys borrowed by him from the Board of Works—it was witnessed that the said Rickard E. Lloyd demised to the said William Keys part of the lands of Portnora, containing 4 acres 1 rood and 9 perches, Irish plantation measure, for the term of sixty years, from the 1st May, 1879, yielding and paying therefor and thereout the yearly rent or sum of £13 2*s.* over and above all taxes (quit-rent and Crown-rent, and landlord's proportion of poor-rates and income tax excepted), and also yielding and paying as long as any sum should remain due on foot or in respect of the said loan of £896 6*s.* 6*d.*, the further yearly annual sum of £44 16*s.* 4*d.*, or such other annual sum, be the same more or less, as should for the time being be payable to the said Board in respect of said loan, the said yearly rents to be payable on the 1st November and 1st May in each year; and said lease contained clauses of re-entry in case the said rents, or any part thereof, respectively, should be in arrear for twenty-one days, and also covenants by the lessee to pay said respective rents or sums of money upon the time when same should become due, according to the true intent and meaning of said lease. The annual sum of £44 16*s.* 4*d.* was reduced as from the 5th April, 1889, under the provisions of the Public Works Loans Act, 1889 (52 & 53 Vict. c. 71, sect. 3), to the annual sum of £35 17*s.*, and such annual sum has continued from said 5th April, 1889, to the present time to be, and still is, payable to the Board of Works in respect of the loan mentioned in the said lease.

Before the issuing of the civil bill in this action, the defendant had paid to the plaintiff all sums due in respect of the said annual sum of £35 17*s.* up to the 1st November, 1899, but the sum of £21 13*s.* 8*d.* was due to the plaintiff by the defendant in respect of the rent of £13 2*s.* up to the 1st November, 1899. It was

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contended, on behalf of the defendant, that no ejectment would lie unless a sum of at least £48 19*s.*, being equal to one whole year of both the said annual sums of £13 2*s.* and £35 17*s.*, was due to the plaintiff.

The question for the determination of the Court was, "Whether an ejectment for non-payment of rent can be maintained in respect of the non-payment of one year of the rent of £13 2*s.*, notwithstanding that no sum is due in respect of the said annual sum of £35 17*s.*"

The following cases were cited: *Stephens* v. *Doyle* (1); *Enniskillen* v. *Reilly* (2); *Exp. Voisey* (3). Furlong's Landlord and Tenant, 471, 1279; Gilbert on Rents, p. 35, were also referred to.

Cur. adv. vult.

Conner, Q.C., and *Jefferson*, for the plaintiff.

Corvan and *P. Kelly*, for the defendant.

June 16.

LORD O'BRIEN, L.C.J.:—

A very exceptional form of lease has given rise to a curious point of law. The facts of this case which has been stated for our determination by my Lord Chief Baron are as follows. [His Lordship read the facts stated in the special case as above set out, and continued]:—

Now these are the facts, and upon these facts it was contended on behalf of the defendant, that no ejectment would lie unless a sum of at least £48 19*s.*, being equal to one whole year of both the said annual sums, £13 2*s.* and £35 17*s.*, was due to the plaintiff; and the net question which my Lord Chief Baron has reserved for the determination of the Court is whether an ejectment for non-payment of rent can be maintained in respect of the non-payment of one year of the rent of £13 2*s.*, notwithstanding that no sum is due in respect of the said annual sum of £35 17*s.*

The argument before us proceeded on the basis that the second and larger sum of £35 17*s.* was not really a rent, but was

(1) 5 Ir. C. L. R. 526; 2 Ir. Jur. 152. (2) 32 L. R. Ir. 372.
(3) 21 Ch. D. 442.

merely an indemnity. We cannot accept this. It was expressly made payable as rent, and was in its essence a consideration for the letting of land—a compensation in respect of the use thereof, though, no doubt, it corresponded in amount to what the landlord would be from time to time liable for. It, no doubt, secured for the landlord an amount equal to what he was to pay to the Board of Works, but it was made directly payable to him, and as far as forms of expressions could do so, it was as much a rent as the smaller rent of £13 2*s*. The practical question in the case was not as to whether the sum of £44 16*s*. 4*d*. (subsequently reduced to £35 17*s*.) was in its nature rent, but whether, where two distinct rents are reserved out of all the subject-matter of a demise—out of one *totum* as it were—an ejectment for non-payment of rent does not lie unless a sum equal in amount to a full year's rent is due in respect of both. It is conceded in the present case that the full sum payable for one year is due in respect of the smaller rent. Now, no doubt there is a clause of re-entry applicable to both rents, providing that in default of the payment of either, or of any part thereof, respectively, the landlord may enter and re-possess him of the entire subject-matter demised. It may be said a common law ejectment would lie for recovery of all the premises demised; but does a statutable ejectment under the 52nd section of the Landlord and Tenant Act of 1860 lie under the circumstances of the present case? I think not. I do not think it was ever contemplated by the framers of the Act of 1860 that there could be two actions of ejectment in respect of the same lands held under one lease. Though two rents were reserved, it appears to me that the year's rent in the 52nd section of the Landlord and Tenant Act of 1860 contemplated that there should be but one action of ejectment, and that for the full rent. Each sum here is certainly styled a rent; but the reality of the thing is that what was in its essence but one entire rent, issuing out of one *totum*, was split into two parts, because the larger portion of that which was rendered as rent was variable in amount and ultimately subject to cesser.

This is not the case of several rents issuing out of different premises separately demised in one instrument of demise. It is a demise of what I may describe as one *totum* with what are

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called two rents issuing out of the same one *totum*. The full rent comprised both the smaller rent of £13 2*s*. and the larger rent of £35 17*s*.; and, in my opinion, the 52nd section of the Act of 1860 did not contemplate the recovery by ejectment for non-payment of rent of one entire *totum* by reason that one year's rent of one of two so-called rents reserved was due. To justify a proceeding under the section, there should be a full year's rent due, that is to say, a year's rent of each of the formally reserved two rents.

The definition of the term rent in the Act of 1860 would seem to me to point to the full sum that is given in return for the letting of lands, which word "lands" is also defined in the same statute to include houses, messuages, and tenements. In the definition section it is enacted that the word "rent" shall include "any sum or return in the nature of rent payable or given by way of compensation for the holding of any lands." It would appear to me that the sum payable as compensation for the holding of the lands is the full sum payable therefor, that is to say, as regards this case, the aggregate of the sums of £13 2*s*. and £35 17*s*.; and that the word "sum" in this definition section and the word "rent" in the 52nd section are identical in meaning. If they are, as I think they are, identical in meaning, the ejectment did not lie in the present case, and the question put to us by my Lord Chief Baron must be answered in the negative.

GIBSON, J.:—

There are two questions in this case, the construction of the lease, and the nature and operation of the statutory ejectment. First, what was the rent of the holding? The plaintiff contends that the second sum was intended to pay off the loan expended on the buildings, and that the parties could not by calling it rent make it so, any more than if it was a penal sum. The holding, however, was let as an entire thing, land and buildings together. The two sums were the compensation or return for the letting, and made up the "rent" within the definition in Deasy's Act. Each sum issued out of the holding as a whole: *Knight's Case* (1); and

(1) 5 Rep. 54 b.

not out of separate portions: *Winter's Case* (1). The division of the rent into two parts, and the terminable character of one part, are not inconsistent with the nature of true rent: *Ashtown* v. *White* (2), *Condon* v. *Haynes* (3), *Voisey's Case* (4). Rent service is often from its nature divisible—as where part consists of money and part is payable in kind or by labour or other services (see notes to *Clun's Case*) (5). On this first point, which alone was argued at the Bar, I am of opinion that the two sums together constituted the rent. There is no severance of the reversion or of the tenancy.

The parties, however, intended possibly, so far as they could, to create two rents with distinct remedies for each; and it may be suggested that under section 52 of the Act of 1860, a separate ejectment may be maintained in respect of each. Where each sum is payable for the entire holding by the same tenant, to the same landlord, I am not aware of any authority that they can be considered as separate rents; they seem to make up a conjunct rent consisting of two parts. Supposing, however, that each sum can be regarded as a distinct rent-service, would section 52 enable an ejectment to be brought in respect of each such rent? I think it would not. The statutory ejectment is for the recovery of the holding as one entity; and one year of the whole *money redditus* payable in respect of the holding must be due to support an ejectment. There cannot be (under section 52), in a case like the present, concurrent rights of action and rights of redemption in respect of the two sums disjunctively. There is no precedent at Common Law or since the statute to justify any such procedure.

What the plaintiff's remedy might be at Common Law, apart from the statute, or on what principles a fair rent should be calculated, or what would be the position, if part of the render was to be in goods or labour, is not before us, and I abstain from discussing any such question.

In my opinion, though the return for the holding was divided into two parts, there was only one rent; and even if for

(1) 3 Dyer, 308 b.
(2) 11 Ir. L. R. 400.
(3) 9 Ir. C. L. R. App. 1.
(4) 21 Ch. D. 442.
(5) Tudor's R. P. Cases, 4th Ed., 33.

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some purposes separate rights may have been attached to each part, a statutory ejectment, based on non-payment of part, where a complete year's rent is not due, cannot be maintained.

KENNY, J.:—

I entertain a very clear opinion, that the yearly sum of £44 16*s.* 4*d.* (subsequently reduced to £35 17*s.*) must be regarded either as a rent or portion of a rent payable out of the demised premises. It represents the agreed yearly value of the dwelling-house which had been erected by the lessor on the lands with the proceeds of the Board of Works loan—borrowed by him for the very purpose—and it is the "sum or return" which is given by the tenant by way of compensation for the holding of so much of the demised premises as is represented by the buildings. Of that I think there can be no doubt on the face of the lease. The remaining rent or yearly sum of £13 2*s.* represents the return by way of equivalent for the holding of the *lands*, exclusive of the buildings. The two yearly sums together represent the annual sum in the nature of rent given, by way of compensation, for the entire holding, and together or separately they come within the definition of "rent" in the 1st section of the Landlord and Tenant (Ireland) Act, 1860. If each of these rents had been reserved separately out of the particular portion of the holding, the yearly value of which it represented, I would have been inclined to yield to the argument—for which *Tanfield* v. *Rogers* (1) and *Winter's Case* (2) are authorities—that the demise in question was severable, and in reality amounted to distinct demises of the two constituent parts of the holding, with several reversions and at several rents. But the demise here is one and indivisible, and the two rents, though separately reserved, and with rights of re-entry as to each, are issuing and payable out of the entire holding. In fact, although there are two sums reserved, they in truth form but one entire rent, which is to be paid in respect of both house and lands. I do not think that the circumstance that this entire rent may be variable in amount at all affects the case. A rent uncertain in amount may be a good rent in respect of which ejectment

(1) Cro. Eliz. 340. (2) 3 Dyer, 308 b.

will lie: *Ex parte Voisey* (1). If therefore the unpaid rent in respect of the non-payment of which the present ejectment is brought does not amount to a full year's rent of the combined sums, the 52nd section of Deasy's Act, which enables ejectment to be brought, is not applicable to the case, and the question put to the Court by the Lord Chief Baron should be answered in the negative.

Solicitors for the plaintiff: *Moore, Keily & Lloyd.*
Solicitors for the defendant: *Blackall & Son.*

A. E. R. J.

TYRRELL *v.* FLANAGAN (2).

Justices—Case stated—Evidence—Trespass in pursuit of game—Preservation of Game Act (27 *Geo.* 3, *Ireland, c.* 35), *sect.* 10—27 *&* 28 *Vict. c.* 67—*Case Stated Act* (20 *&* 21 *Vict. c.* 43).

Upon the hearing of a complaint for unauthorized pursuit of game, it is not necessary in order to sustain a conviction to prove affirmatively that the defendant fired at any game, or had any game in his possession, if other evidence sufficiently lead to the inference that the offence was committed.

Per Murphy and Boyd, JJ. Where Justices state on the face of a special case not only a conclusion of fact, but also the grounds of fact leading them to that conclusion, it is open to the Court to consider whether those grounds are sufficient in law to support their determination.

Per Lord O'Brien, L.C.J. Where there is legal evidence to sustain a finding of fact by the Justices, such finding cannot be questioned on a case stated.

CASE STATED by the Justices of county Kildare in regard to a complaint "that on Monday, the 27th August, 1900, defendant was found unlawfully in pursuit of game with a gun and setter dog on part of the lands of Killinagh, in said county, contrary to 27 & 28 Vict. cap. 67, the exclusive right of the game on said lands being reserved to the landlord by deed dated 27th April,

(1) 21 Ch. D. 442.
(2) Before LORD O'BRIEN, L.C.J., and MURPHY and BOYD, JJ.

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1877, and by order of the Land Commission dated 27th July, 1888." The complaint was heard by two Justices, who dismissed the case "without prejudice."

The evidence (as stated in the case) was, in substance, to the following effect:—

Mr. Tyrrell, the informant, stated that on the 27th August he heard eight or nine shots fired on Mrs. Flanagan's farm between 7.30 and 8.30 p.m., about half a mile away from where he was; that by the Land Commission order of 27th July, 1888 (produced), fixing a fair rent on the holding of Mrs. Flanagan, defendant's mother, the exclusive right of shooting and taking game was reserved to the landlord, H. Joly, and that he (witness) was lessee from Joly of the shooting on the property.

Robert M'Sorley, a gamekeeper, on the evening in question, was in the neighbourhood of Mrs. Flanagan's holding, and heard two shots fired in that direction. He then, with Hayes, another keeper, went over towards Flanagan's land. He heard two more shots fired before he crossed the boundary. "When I was within 20 yards of defendant (Flanagan) he fired two shots. I saw him the other side of some sally-trees. When he came out of the covey I spoke to him. This was all on Flanagan's land. Defendant had a setter dog and gun with him. I saw the dog ranging about, and a couple of snipe got up. I do not know what he fired at. I asked him for his authority and told him he had no right to be there. He said, 'Is that so,' and walked on. The dog was ranging, and he kept calling to keep him in range. I heard two more shots after that. . . . I could see the dog beating in the cover, and there are pheasants, partridge, and snipe there." (Cross-examined)—"There are hares in the place; there may be some rabbits in the place; there may be a rabbit any road. I objected to him and the dog in pursuit of game. He fired at no game that I seen. . . ."

James Hayes, who was with M'Sorley, stated:—"I heard shots in the direction of Flanagan's land. I did not cross the boundary into Flanagan's land, but saw M'Sorley cross over. . . . After the conversation [between M'Sorley and Flanagan] I followed Flanagan upon Mrs. Flanagan's land; he was walking; the dog was ranging; it was getting dark then. I saw no partridge, but I heard partridge calling, and after I heard the partridge

calling I heard two shots; it might be ten minutes after. The dog was ranging on the same field as the partridge were calling. I had a conversation with Flanagan. I told him to call up the dog. He said he would, and he whistled for him. . . . I looked at my watch, 8.25 p.m. I heard two shots afterwards. I do not know who fired them. They came from the direction that Flanagan had left. . . ." (Cross-examined) "I did not see Flanagan fire a shot after 8 p.m. on that day. There are hares and rabbits on the farm of Mrs. Flanagan. For all I know the shots I heard fired on Flanagan's land may have been fired at hares and rabbits. I know the habits of game dogs—I partly know them. Game dogs will set hares and rabbits. For all I know the defendant may have been looking for hares and rabbits. I do not know whether he has any authority to do so or not. I saw no game with him, and saw him fire at no game." (Re-examined) "I saw no rabbits with him. . . ."

Patrick Flanagan, a brother of the defendant, produced a letter [apparently dated 23rd November, *sine anno*] from Mrs. Flanagan (the tenant of the farm), authorising the defendant "to kill and carry away all the rabbits and hares in his possession."

The Justices stated (*sic*) that "being of opinion that, as no evidence was given to show that defendant fired at any game or had any game in his possession, and it was admitted by Hayes, one of the witnesses for the informant, that a game dog may be used, and is used, for the purpose of setting hares and rabbits, we came to the conclusion that defendant was only in search of ground game, which he had a right to under the authority produced, and accordingly made the order aforesaid," and they submitted to the Court the question whether they, the Justices, were correct in point of law in their determination, or as to what," etc.

Richards, for the appellant.

Denning, for the respondent.

Counsel cited *Kingston* v. *O'Neill* (1); *Irvine* v. *Osborne* (2); *Reg.* (*Palmer*) v. *Reilly* (3); and *Headfort* v. *Farrelly* (4).

(1) 6 L. R. Ir. 101.
(2) 25 Ir. L. T. R. 36.
(3) 30 L. R. Ir. 302.
(4) [1894] 2 I. R. 12.

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BOYD, J.:—

In this case I am of opinion that, as the Justices have not only stated what they actually found as a fact, but the grounds also on which they arrived at their conclusions of fact, this Court is entitled to consider whether those grounds are sufficient in law to support their decision. [His Lordship read the opinion of the Justices as stated in the case, and continued]—

That view proceeds upon the ground that there was no evidence that the defendant had fired at game, or had game in his possession. But the authorities cited show that it is not necessary, in order to convict a person accused of such an offence, that it should be affirmatively proved that he had shot at game or had game in his possession.

It is suggested that the defendant was looking for ground game—rabbits and hares—but the evidence as to the existence on these lands of animals of either class is meagre in the extreme; and there *was* evidence that there were partridge and pheasants and snipe there—that at the very time the defendant was on the lands with gun and dog, and at the very time the report of a gun was heard, the partridge were heard calling to one another in the field in which he was. The Justices seem to have erroneously considered that more evidence was required,—and this being the basis of their order, a "dismiss without prejudice,"—I am of opinion that the case should be remitted to them with the expression of our opinion that, having regard to the existing law as defined by the judicial decisions upon the matter, the evidence given before them would be sufficient to justify them in convicting the defendant.

MURPHY, J.:—

Upon the evidence it is clear that this farm was well stocked with game, and that some effort was being made—a difficult thing in this country—to preserve it. One afternoon in August the defendant, who had no right to be there in pursuit of game, proceeded upon the lands, fully equipped for the destruction—if that was his object—of any game he might find. Two shots were heard, by whom fired was not seen, the defendant being behind some covert at the time,—but still the inference is not an improbable one that it was the defendant who fired the shots; and his dog

was at this very time ranging as if for game, and immediately afterwards the defendant was seen by one of the witnesses in the very field, in which the shots had been heard, in which his dog had been ranging, in which the partridge had been heard calling.

The Justices have chosen to believe and to decide that they were nevertheless justified in holding that the defendant was in search of rabbits, under a written authority from his mother.

If such an excuse were accepted it would be idle ever to insert in a tenant's lease any reservation of the game on the lands. One of the witnesses says that rabbits may be seen or found in any place, "on any road"; but there was no evidence, except this general expression of belief, that there was a single one in this particular field. The Justices considered that, as the defendant was not seen in the act of shooting at game, and as no game was found in his possession, and as a game dog *might* be used to set rabbits, they were not at liberty to convict. In this they were wrong in point of law, and the case should be remitted to them with the opinion of the Court to that effect.

LORD O'BRIEN, L.C.J.:—

I regret to say that I entertain a different opinion from my brethren. The question is not whether the Justices were right in their determination upon matters of fact and evidence, but whether there was any evidence to sustain their determination as a matter of law. No doubt there was evidence that there were pheasants and partridge in the place; but there was evidence that there were hares there. M'Sorley, in his evidence, stated that there were hares there, and that there might be some rabbits. But the evidence of Hayes who was called for the informant was clear; he stated on cross-examination as follows:—"I did not see Flanagan fire a shot after 8 p.m. on that day. There are hares and rabbits on the farm of Mrs. Flanagan. For all I know the shots I heard fired on Flanagan's land may have been fired at hares and rabbits. I know the habits of game dogs—I partly know them. Game dogs will set hares and rabbits. For all I know the defendant may have been looking for hares and rabbits. I do not know whether he has any authority to do so or not. I saw no game with him, and saw him fire at no game." A letter

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from the defendant's mother, the tenant of the farm, authorising him to kill and carry away rabbits and hares was produced.

In the result, the defendant, with a gun and dog was on this farm—a farm on which there were pheasants and partridge, and hares and rabbits—and it was possible that the dog might be used to set any of these. The defendant had on him a permission in writing to kill ground game. The Justices state that "being of opinion that as no evidence was given to show that the defendant fired at any game, or had any game in his possession, and (as was admitted by Hayes, one of the witnesses for the informant) that a game dog may be used, and is used, for the purpose of setting hares and rabbits," they "came to the conclusion that the defendant was only in search of ground game, to which he had a right under the authority produced." It is quite a mistake to suppose that the magistrates believed, or acted on the belief, that it was necessary in order to sustain a conviction that it should have been proved that the defendant fired at game, or had game in his possession. They merely relied upon the absence of proof of these matters as elements in considering what their judgment should be.

The Justices came to the conclusion, as a matter of fact, not of law, that the defendant was in search of ground game, and that for this he had produced authority. In my opinion there was *legal* evidence to sustain that finding of fact. For myself, I should have drawn a very different conclusion from the evidence; but, having regard to the way in which the matter is presented in the case stated, we cannot, in my judgment, interfere with the finding of the Court below, and should answer the question submitted to us in the affirmative.

ORDERED.—"That the said Justices were not correct in point of law in considering it necessary in order to sustain a conviction of the defendant that it should have been proved that the defendant fired at any game, or had any game in his possession; and the Court doth further declare that the Justices were at liberty, but not bound, on the evidence, to draw the inference that the defendant had committed the offence charged; and it is ordered that the case be remitted to the Justices, &c."

Solicitors for appellant: *Goodbody & Tisdall.*
Solicitor for respondent: *T. O'K. White.* A. E. R. J.

CRAIG, Appellant; BOYAN, Respondent (1).

K. B. Div. 1901. Feb. 1.

Gaming—Game of skill played for money—Suffering gaming on licensed premises—Licensing Act, 1872 (35 & 36 *Vict. c.* 94) *sect.* 17.

The respondent, a licensed person, suffered the game of "pool" to be played for small money stakes on a billiard table in the licensed premises.

Held, that the respondent had committed the offence of suffering gaming on the licensed premises under the Licensing Act, 1872, sect. 17.

Case stated for the opinion of the King's Bench Division pursuant to 20 & 21 Vict. c. 43.

At a Petty Sessions held at Gorey in the county of Wexford on the 7th December, 1900, the respondent was charged upon a summons obtained by the appellant, a District Inspector of Constabulary, "for that on the 25th October, 1900, she being a person duly licensed to sell intoxicating liquors by retail did suffer gaming to be carried on on her licensed premises, to wit—playing pool for money on a billiard table, contrary to 35 & 36 Vict. c. 94, s. 17."

The material portions of the evidence given before the Justices appear from the following extracts from the case stated:—

"At the hearing of the said complaint it was proved on the part of the complainant that the defendant was owner of the Railway Hotel, 72, Main-street, Gorey, which were licensed premises as in summons mentioned. That at about 11.20 p.m. on the 25th October, three persons who were staying in the hotel were found playing pool for money (the stakes were one penny per life which when lost were paid to the winner). The defendant was present in the billiard room, and when accused said her guests always played and paid her for the use of the table. The hotel was a well-conducted establishment. . . ."

"For the defendant one of the players was examined and said he was a cashier in the National Bank in Gorey, and was at the

(1) Before Andrews and Johnson, JJ.

K. B. Div. 1901. CRAIG, *Appellant;* BOYAN, *Respondent.*

time of the alleged offence staying at the Railway Hotel. He had played pool for money at hotels in various parts of Ireland and in England. So far as his experince went it was the universal custom in hotels with billiard tables to play pool for money. He had seen notices outside hotels stating that pool and billiards were played inside. Pool and billiards are games of skill as evidenced by there being billiard professionals. Cross-examined for complainant, he said, he could not give the name of any hotel where he had seen such notice."

It was contended on the part of the appellant that a licensed person suffering any game for money or money's worth to be played on his licensed premises committed an offence against the section, and that upon the facts proved the Court was bound to convict.

It was contended on the part of the respondent—1, that billiards and pool being lawful games and games of skill do not constitute gaming; 2, that the custom of playing billiards and pool in hotels holding publican's licenses is not affected by the general words in the statute relied on; 3, that the game of pool as played on the occasion and under the circumstances mentioned in the evidence was not gaming within the 17th section of the Licensing Act of 1872.

The majority of the Justices were of opinion that the contention of the respondent was correct in point of law, and the following order was made—"Dismissed on the merits by the majority of the Bench, Lord Courtown, and Mr. Meldon, Resident Magistrate, dissenting."

The present case was stated, on the application of the appellant, to obtain the opinion of this Division as to whether the majority of the Justices were correct in point of law in their determination, or as to what should be done in the premises.

Morphy, for the appellant:—

Playing any game, whether of chance or skill, for money is gaming: *R.* v. *Ashton* (1); *Bew* v. *Harston* (2); *Dyson* v. *Mason* (3).

(1) 1 E. & B. 276. (2) 3 Q. B. D. 454.
(3) 22 Q. B. D. 351.

Ronan, K.C., and *James O'Connor*, for the respondent:—

To constitute gaming the winning of money must be the predominant motive. To hold that an offence was committed in the present case would mean the closing of the billiard rooms in every hotel in the kingdom, since on the same principle it could be urged that it would be gaming even if there were no money stakes but merely the usual agreement that the loser should pay for the use of the table. The game of billiards has been specially recognised and dealt with by the Gaming Act (8 & 9 Vict. c. 109) ss. 4, 10, and 11. The cases which have been cited on behalf of the appellant do not bind this Court: *Callaghan* v. *Society for the Prevention of Cruelty to Animals* (1).

ANDREWS, J.:—

It is unnecessary to determine any of the interesting points which have been suggested by Mr. Ronan on the construction of the Gaming Act (8 & 9 Vict. c. 109) and other Acts not in question in this case. The question in the present case arises, and we decide it, upon the construction of the 17th section of the Licensing Act of 1872 (35 & 36 Vict. c. 94) which imposes the liability to a penalty not exceeding for the first offence £10 on any licensed person who "suffers any gaming, or any unlawful game to be carried on on his premises." That section contemplates two distinct things—1, "gaming," and, 2, "any unlawful game," and there may be "gaming" although the game played is lawful. In the present case the facts are not in dispute, and the question is whether on those facts the defendant suffered "gaming" to be carried on in her licensed premises—not, it will be observed, whether she suffered pool to be played in her licensed premises, which might, if not played for money be lawfully played there, being in itself a lawful game. In *The Queen* v. *Ashton* (2) the expression "gaming" was interpreted by Lord Campbell as meaning "playing at any game for money or money's worth," and with the exception of some difference of opinion between the Judges in the case of *Bew* v. *Harston* (3) which I shall again refer to, this, so

(1) 16 L. R. Ir. 330. (2) 1 Ell. & Bl. 286; 22 L. J. M. C. 1.
(3) 3 Q. B. D. 454.

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far as I am aware, has ever since been the accepted meaning of the word "gaming," which is by no means identical with "playing at a game."

In *Bew* v. *Harston* (1) one learned Judge was of opinion that playing a lawful game for money was "gaming," and another thought that to constitute "gaming" there must be an element of chance in the game. One would think that there might be *some* element of chance in almost any game, whether a game of skill or not, but the difference of opinion I have referred to did not result in any dissent from the judgment of the Court which affirmed the conviction. In the comparatively recent case of *Dyson* v. *Mason* (2), "skittle pool," which is a lawful game of skill, was played for small money stakes on a billiard table in licensed premises, and on a case stated it was held that the licensed person could properly be convicted under the Licensing Act of 1872, sect. 17, sub-sect. 1. That case is in point with the present case.

The policy of prohibiting "gaming" in licensed premises is not a question for us. The Legislature has thought proper to prohibit it, and good reasons may be assigned for doing so. It seems obvious that if "gaming" is to be prohibited no line can be well drawn defining what amount of money or money's worth would constitute "gaming," and what would not. The legislative prohibition is absolute, and is irrespective of the particular amount for which the game is played.

In the present case the uncontradicted evidence before the Justices was that persons were playing the game of pool on the defendant's licensed premises in her presence for money stakes, small, no doubt, but still for money stakes between the players which were distinct from any payment made to the defendant for the use of the billiard table. We must therefore hold that the Justices were not correct in point of law in their determination, and inform them that upon the uncontradicted evidence they ought to have convicted. We think, however, that having regard to what has been stated (which I have no doubt is the fact) that "gaming" of this kind has been for long going on over and over

(1) 3 Q. B. D. 454. (2) 22 Q. B. D. 351.

again in hotels and other licensed premises throughout this country without objection, and that this appears to have been the first prosecution for it here, we ought not to give any costs against the defendant, whose hotel is stated in the case to have been a well conducted establishment.

I would also venture to suggest to the magistrates that when they do convict in this first case they may consider that justice might be satisfied by imposing a nominal fine, and abstaining from recording the conviction on the defendant's licence.

JOHNSON, J., concurred.

Solicitor for appellant: *Sir P. Coll.*
Solicitors for respondent: *M. J. O'Connor & Co.*

J. G. T.

HASLETT AND ANOTHER *v.* SHARMAN AND ANOTHER (1).

Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *sects.* 52 *and* 54 *—Taxes—Poor-rate—Existing tenancy—Agreement for tenancy made before the "appointed day" to commence after such day—Validity of contract that landlord should pay poor-rate.*

The provision in sect. 52, sub-s. 2 of the Local Government (Ireland) Act, 1898, making void any contract entitling the occupier of a hereditament to deduct from his rent any part of the poor-rate does not apply to contracts to that effect contained in reversionary leases, or agreements for such leases, made before the "appointed day," though not coming into operation until after that day.

By an agreement executed subsequently to the passing of the Local Government (Ireland) Act, 1898, but prior to the 1st of April, 1899 (the appointed day on which the provisions of the Act with respect to the incidence of poor-rate came into operation), the plaintiffs agreed to let to the defendants certain premises for a term of ten years from the 1st of May, 1899, "the landlord to

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and BOYD, JJ.

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pay all taxes except water rate, which is to be paid by the tenant." The water rate referred to was a personal charge.

Held, that on the principle of *Scovell* v. *Gardiner* (16 Ir. C. L. R. 318) the word "taxes" should be construed as including poor-rate, and that such construction was not affected by the fact that the agreement was entered into subsequently to the passing of the Local Government Act.

Held, also (*dub.* Lord O'Brien, L.C.J., and Boyd, J.) that the agreement having been entered into prior to the "appointed day" the tenancy thereby created was an existing tenancy within the meaning of ss. 52 and 54 of the Act, and that a contract by the landlord to pay poor-rate was valid.

CASE STATED by Mr. Justice Barton, on the hearing of a civil bill appeal from the Recorder of Belfast.

By agreement dated the 14th March, 1899, the plaintiffs agreed to let to the defendants certain premises in Belfast, for a period of ten years, from the 1st May, 1899, at the yearly rent of £300, "the landlords to pay all taxes except water rate which is to be paid by the tenants. The tenants to take out a lease if required." The defendants were permitted by a special arrangement with the plaintiffs to take possession on the 1st March, 1899, but nothing turned on this, and the case was treated throughout as being one of a tenancy commencing in possession on the 1st May, 1899. No lease was ever taken out. The defendants having paid the poor-rate for the year 1900, deducted the amount (£15) from the rent payable by them to the plaintiffs. The plaintiffs brought the present proceedings to recover the £15 as balance of rent due. The "water rate" referred to in the agreement was admitted to be a personal charge. The "appointed day" on which the Local Government Act (Ireland), 1898, came into operation in so far as the present case is concerned was the 1st April, 1899.

Hanna (with him *Harrison, K.C.*), for the plaintiffs:—

We rely on two points. First by section 52, of the Local Government (Ireland) Act, 1898, the occupier cannot deduct poor-rate, and any contract to the contrary is void. The present is not an "existing tenancy" so as to bring the defendants within the exception in section 52, or the provisions of section 54. "Existing" means existing on the appointed day: section 109. An existing

tenancy, means one existing in possession on the appointed day: *Sproule* v. *Ramsey* (1); *Vernon* v. *Pile* (2); secondly, even assuming that an agreement by the plaintiffs to pay poor-rate would be valid, there is no such agreement in the present case. The agreement is to pay "taxes," and poor-rate is not a tax.

[Gibson, J. referred to *Scovell* v. *Gardiner* (3)].

Hume, K.C., and *M'Ilroy*, for the defendants:—

The whole scope and object of section 54 is to preserve existing rights. Sub-sect. 3, especially, is strongly in our favour. The relation of landlord and tenant now depends on contract, and there was here a contract binding the lands, in existence on the appointed day. *Sproule* v. *Ramsey* (1) does not apply; it is a decision on a very special section of a statute wholly different in policy from the present: *Allhusen* v. *Brooking* (4), decided under the Ground Game Act, is more in point and is in favour of defendants. As to the second point relied on by the plaintiffs, the exception in the agreement of "water rate" which is a personal charge, brings the case within the principle of *Scovell* v. *Gardiner* (3): see also *Morrogh* v. *Hall* (5).

Harrison, K.C., in reply:—

Scovell v. *Gardiner* (3) must be taken with reference to the law then existing; in the present case the agreement having been entered into after the passing of the Local Government Act the parties must be taken to have known that the landlord could not legally contract to pay poor-rate.

Counsel also referred to *Hassard* v. *Clarke* (6).

Cur. adv. vult.

Feb. 15.

LORD O'BRIEN, L.C.J.:—

My brother Gibson will read the judgment of the Court, in which I concur, though with some doubt, for reasons which I shall express afterwards.

(1) 26 Ir. L. T. R. 4.
(2) 35 Ir. L. T. R. 21.
(3) 16 Ir. C. L. R. 318.
(4) 26 Ch. D. 559.
(5) 32 L. R. Ir. 216.
(6) 13 L. R. Ir. 391

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GIBSON, J.:—

The plaintiffs by contract in writing dated 14th March, 1899, agreed to let to the defendants certain premises in Belfast for a period of ten years certain, from the 1st May then next at the yearly rent of £300, payable quarterly, the landlords to pay all taxes except water rate, which was to be paid by the tenants. If this contract did not constitute an "existing tenancy" on the 1st April, 1899, any stipulation shifting the burthen of poor-rate from the occupying tenant on the landlord would be void under the Local Government (Ireland) Act 1898, section 52, subsect. 2. If it did constitute an existing tenancy the question then arises whether the contract (which does not mention poor-rate), on its true construction imposes liability for poor-rate on the landlords.

The case presents four points for consideration—1. Does section 54 of the Local Government Act apply to reversionary leases made before the passing of the Local Government Act, to come into operation after the 1st April, 1899? 2. Is a contract like the present, made between the passing of the Act, and April 1, 1899, for a reversionary tenancy to commence after the latter date, within section 54? 3. What would be the construction of the contract apart from the statute? 4. Is the construction affected by the circumstance that, the contract having been made after the passing of the Act, the parties must be taken to have known the provisions of sections 52 and 54?

No reliance was placed by counsel on either side on the fact that possession was by voluntary arrangement outside the contract taken by the tenant before April 1, or that no lease was required to be taken out before that date. Nor in the decision of the case do I pay any attention to the statement of Mr. Hume, that the actual agreement between the parties was that the landlords should pay all rates. We must take the contract as correctly representing the intention of the parties, whatever may be the effect of the statute on that intention.

1. On the first question, which is of some general importance, my impression at first was adverse to the defendants. Further consideration has, however, convinced me that they are right. The general presumption is that legislation is not intended to

abrogate existing contractual rights. That presumption applies with immense force where the contract itself is left standing, but a particular term is supposed to have been interfered with, to the prejudice of one of the contracting parties. The statute discloses a clear intention to preserve existing contract rights, and no reason can be suggested why existing rights under a reversionary lease should be swept away any more than rights under an existing lease. Take a lease made in 1890, to commence on the 1st May, 1899, under which the landlord, paying all poor-rates and taxes, was to get £300 a-year rent. Would it not be gross injustice if the effect of the legislature was to leave the tenant liable to the rent, and make him pay the poor-rate as well? It is said that the Act is framed in such a way as to make this result inevitable. This seems quite a mistaken view. The occupier is spoken of in sections 52 and 54, in reference to the actual rate; the tenant cannot be rated till he occupies. But when he pays, his rights are governed by his contract of tenancy. If the contract existed before the 1st April, 1899, it remains valid and effectual. "Existing tenancy" means existing contract of tenancy; for tenancy depends on contract. No other effect can be given to sub-sect. 3. If a reversionary lease, made before the Act, but to commence in possession after April 1, is not within section 54, how are such rights as are expressly provided for by sub-sects. 4, 9 and 11, to be adjusted in case of such a lease? Sub-sect. 4 does not mention existing tenancy at all, though section 52 and the first paragraph of section 54 may carry the term into it; as to which I give no opinion.

It may be urged that in case of present tenancies to which the Land Acts apply, the existing tenancies referred to in sections 52 and 54, must be in possession, and not in reversion. This is so, but I do not see that, because some of the tenancies within section 52 and 54 must be from their nature occupying tenancies, there is any inference that all tenancies within the section must be subject to the same restriction. The section is general and comprises urban as well as rural tenancies, which in their characters are subject to different laws.

Plaintiffs' counsel relied on the case of *Sproule* v. *Ramsey* (1).

(1) 26 Ir. L. T. R. 4.

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Gibson, J.

It is not in point for several reasons. The benefit conferred by section 21, of the Act of 1881, at the landlord's expense, on tenants occupying under existing leases, did not apply where a *bona fide* reversionary lease had been made before the Act; the distinctive note of that statute is consideration of the interest of occupying tenants; and no question there arose of altering the tenancy to the tenant's disadvantage by retrospective legislation.

On the other hand, *Allhusen* v. *Brooking* (1), cited by defendants' counsel, gives material support to their case. It was decided on section 5 of the Ground Game Act of 1880, the structure of which resembles section 54 of the Local Government Act. It excepts from the operation of the Act a case where the right to kill ground game at the passing of the Act was vested by lease or contract in some person other than the occupier. Notwithstanding the use of the words "occupier" and "vested," the opinion of Chitty, J., was that a contract for a reversionary lease made before the Act reserving the ground game to the landlord was within the exception. There was no doubt in that case a subsisting tenancy vested in the same tenant when the Act passed, and the agreement for the reversionary lease of fourteen years, to commence on the 29th September, 1881, was a modification of the terms of the previous tenancy, the occupation of the holding not being altered. But as I read the judgment, the conclusion of Chitty, J., was founded on the principle that the Legislature does not take away vested rights without compensation, and that the landlord had a present vested right under a reversionary letting (see pp. 566 and 567 of report). *Hassard* v. *Clark* (2) follows this case, and assists the defendants. The lease of 1869 operated as a lease of the reversion up to 1st November, 1883, but as to occupation was only reversionary up to that date. The only other authority referred to, *Vernon* v. *Pile* (3) does not apply, for there (as counsel informed us), the term agreed to be given was running on April 1st, 1899.

The first question must therefore be decided in favour of the defendants.

2. Does a reversionary tenancy created between August 12th,

(1) 26 Ch. D. 559. (2) 13 L. R. Ir. 391. (3) 35 Ir. L. T. R. 21.

1898 (the date of Act passing), and the 1st April, 1899 (the appointed day) stand in a different position? The statute does not prohibit or affect lettings made in this interval. The plaintiffs unquestionably could have made a valid lease in possession in March, undertaking to pay all poor-rate. But a reversionary lease binds the land quite as well as an immediate lease; it is an alienation *pro tanto* of the landlord's estate. If a reversionary lease executed on August 1st, 1898, could effectually by its terms regulate the payment of poor-rate, I fail to see why a different conclusion should be arrived at in the case of a similar lease made on August 13th, or any day before April 1st, 1899. The only distinction that I can think of would be that in such a case the Court might be disposed to construe an ambiguous contract so as to harmonise with section 52 as to future tenancies. This I shall consider in a moment.

3. Apart from the effect of the statute, the construction of this contract is determined by *Scovell* v. *Gardiner* (1) and *Morrogh* v. *Hall* (2). The exception of "water-rates" a personal charge, enlarges the meaning of "taxes," which must include poor-rates.

4. The last point is whether the construction is affected by the date of the contract, which was made at a time when both landlord and tenant knew that the provisions of the Act would come into operation in a few days. As to this question, which was argued with little confidence on behalf of the plaintiffs, I have had some doubt. Mr. Hume says that it was admitted in the Court below that the true agreement was that the landlord should pay the rates. If the tenant is prejudiced by the drafting, the matter can be set right elsewhere. I must take the contract as it stands. If the *prima facie* meaning of the words in their context is that "taxes" includes "poor-rate," that meaning ought not to be cut down merely because the actual tenancy was to begin after April 1st, 1899.

The statute may affect the operation of the contract, but its construction, whether executed on the day before or the day after the Act passed, ought to be the same. If the contract was an

(1) 16 Ir. C. L. R. 318. (2) 32 L. R. Ir. 216.

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existing contract of tenancy its interpretation ought not to shift according as the letting was immediate or in reversion.

I think that the dismiss pronounced by the learned Recorder must be affirmed.

MADDEN, J.:—

At this time when the poor-rate for 1900 was struck, the defendant was in occupation of certain rateable premises; they had been demised to him in the month of March, 1899, by an agreement under which the term was to begin to run from the 1st May. By the terms of this agreement the lessors were bound to pay all taxes except water-rate. We are all, I believe, of opinion, that as the law stood before the passing of the Local Government Act, an agreement so framed would throw upon the landlord an obligation to pay poor-rate; the exception of water-rate, admittedly, a personal imposition, interpreting the meaning of the thing from which it is excepted—taxes.

The plaintiffs contend that the defendant has been deprived of the rights which he would otherwise have had under his agreement by the 52nd section of the Local Government Act, which enacts that the occupier shall not be entitled to deduct from his rent any part of the poor-rate, and avoids any contract to the contrary, subject, however, "to the provisions hereinafter contained respecting occupiers under existing tenancies." By "existing" is meant existing on the appointed day; that is to say in the present instance, the 1st April, 1899.

Is then the occupation which rendered the defendant liable to poor-rate referable to a tenancy which was "existing" on that day within the meaning of the 52nd section? If this question is answered in the affirmative, the defendants are clearly entitled to the benefit of their contract with the plaintiffs, under the provisions of the 52nd and 54th sections.

In interpreting those sections we must remember that they were framed for the purpose of preserving vested rights under existing "contracts of tenancy," the phrase employed in the 3rd sub-section of the 54th section. The term employed in the 52nd section is tenancy; but the subject-matter is one and the same. Apart from this consideration why should I read "existing tenan-

cies" as equivalent to "tenancies existing in possession"? The law recognizes as a legal entity a tenancy to commence *in futuro*. The tenancy under consideration in the present case bound the plaintiffs' estate on the execution of the agreement by which it was created. If this estate had then been conveyed by a Land Judge, the defendants' tenancy would be scheduled as an existing tenancy, to commence *in futuro*. In a somewhat similar case which arose under the Ground Game Act, 1880, Chitty, J., dealing with the phrase "is vested" remarks that it "does not mean simply that it is vested in possession, or else that would have been the language of the section": *Allhusen* v. *Brooking* (1). Similarly, in the present case, if the section had meant by "existing" existing in possession, it would have said so. It did not say so (we may assume) because a gross injustice would have been thus inflicted on persons like the defendant who had acquired vested rights under existing contracts.

The question before the Court of Appeal in *Sproule* v. *Ramsey* (2) was a different one. The Land Act of 1881 dealt with occupying tenants, and this circumstance is pointedly referred to in the concluding portion of the judgment of the Lord Chancellor. The question of occupation was essential in that case; but for the purposes of a section which is intended to protect existing contractual rights, the period at which occupation under the contract commences seems to me to be irrelevant. Occupation on the part of the tenant is mentioned in the statute, but with reference to liability to the payment of rates. The question could not arise until occupation under the contract of tenancy commenced. But for the purpose of the saving clauses under consideration the essential period of time appears to me to be that at which the agreement was entered into and became an existing contract of tenancy.

We have been asked to draw an inference from the time at which this agreement was made as to the existence of a special agreement between the parties. If this inference is one of fact, it has not been found. If it is one of law, we must assume that the parties contracted with a view to what we believe to be the true construction of the Act. The defendants' tenancy was either

(1) 26 Ch. D. 559. (2) 26 Ir. L. T. R. 4.

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existing or non-existent on the 1st April, within the meaning of the Act. If it was then existing, rights under it are saved, irrespective of the date of its creation, which cannot effect its incidents. No one contends that the contract of tenancy has been avoided generally by the Act. It would be a strange result if while the contract stood, one of its terms were altered by retrospective legislation. I certainly do not feel bound to read into the section the words "in possession" or "in occupation," in order to effect this result.

BOYD, J.:—

I concur, but I must say with considerable doubt.

LORD O'BRIEN, L.C.J.:—

I am in the same position as my brother Boyd. I am influenced in concurring with my brothers Gibson and Madden by what I consider the policy of the Act, its scope and object, namely to preserve existing contracts—vested rights; but I own I have very great difficulty as to whether the words used are sufficient to carry out—to effectuate that policy—that object in the present case. The sections bearing on the question before us are sections 52 and 54. Sub-sect. 2 of section 52 enacts as follows:—"The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor-rate, and any contract to the contrary respecting such deduction shall be void; subject, nevertheless, to the exceptions in this Act and to the provisions hereinafter contained respecting occupiers under existing tenancies." Section 54 contains provisions for the adjustment of rent in cases "where the poor-rate is made upon an occupier of any holding under an existing tenancy." An existing tenancy means, as appears from the definition of the expression "existing," given in section 109 of the Act, a tenancy existing on the appointed day, viz. the 1st April, 1899. Was there then in the present case a tenancy existing on that date? I have always understood an existing tenancy to mean a tenancy where there was a landlord, a tenant, a subject-matter, and a present right to the immediate possession thereof. In the present case we have an agreement for a tenancy to commence not on the date of that agreement,

but on a future day, viz. the 1st May, 1899, a day subsequent to "the appointed day." This agreement created no immediate tenancy: it amounted merely to a contract for a future tenancy to commence on the 1st May. Suppose there had been here a tenant in possession under a contract of a tenancy existing up to the 1st May, would there have been two existing tenancies, one in the person who held up to the 1st May, and another in the person who was to hold from that date? The 54th section moreover uses the word "holding," which is defined by sect. 109 to mean "any house or land . . . held by a tenant of a landlord for the same term and under the same contract of tenancy." Were there at the same time two holdings in reference to the same subject, one present and one future, and can the expression "existing tenancy" comprise both? I doubt whether the Act of 1860 throws any light upon the question we have to determine. The first section of that Act defines what a lease is. No doubt a lease may be an instrument to take effect *in futuro*, as well as an instrument to take effect in immediate possession, but what we are concerned with here is the expression "existing tenancies," and certainly if a suit was brought for specific performance, the term ordered to be executed would be from the 1st May, and the question is whether under the terms of the agreement with which we are dealing we can say there was on the appointed day, which was before the 1st May, an "existing tenancy." However, I think some support for the view taken by my brothers Gibson and Madden may be derived from the 3rd sub-section of section 54. It provides that "an occupier entitled, whether by law or contract, to deduct a sum from his rent shall be deemed entitled to deduct within the meaning of this section; and where a person under the law existing at the time of his contract of tenancy, or under his contract of tenancy, is not liable to any cess or rate, he shall be in the same position under this section as if he were entitled to deduct the whole of that cess or rate from his rent."

The expression "contract of tenancy" in that sub-section may mean not merely a contract creating a present tenancy to be operative in possession, but may possibly include a contract by which a future tenancy would be created, that is to say a contract which created a present right to a future tenancy. I think,

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though with very great doubt, that, having regard to the scope and object of the Act, we should give the expression such extended meaning, and interpreting the words "contract of tenancy" in this way, we should read the expression "existing tenancies" as practically meaning the same thing—that is to say we may call in aid the words "contract of tenancy" in this sub-section to explain the meaning of the words "existing tenancies." The policy of the statute is to avoid interfering with vested rights, and although the language is very far from clear, I think we should construe it in accordance with the general intention. Yielding, therefore, to that intention of the statute to preserve vested rights, I will not dissent from my brothers Gibson and Madden, but certainly I share the doubt of my brother Boyd. The ground game case decided by Lord Justice Chitty: *Allhusen* v. *Brooking* (1), goes to support the result we have arrived at, though again with reference to that case I must confess that when the entire judgment of Lord Justice Chitty, and not merely a part of it, is read, my doubts remain unsolved.

Solicitors for the plaintiffs: *C. & J. Blake.*
Solicitor for the defendants: *Frank Kerr.*

J. G. T.

(1) 26 Ch. D. 559.

IRISH LAND COMMISSION *v.* PATRICK MAGORIAN, ROBERT JAMES WATSON, JOHN STEWART, HUGH ALEXANDER, AND ROBERT EAKINS (1).

Q. B. Div. 1900.
Nov. 5, 10.
Dec. 1.

Fee-farm grant—Redemption of Rent Act, 1891—*Tithe rentcharge—Liability of tenant after fair rent fixed.*

The grantee or tenant under a fee-farm grant, after an order under the Redemption of Rent Act, 1891, fixing a fair rent upon his holding, still remains liable to tithe rentcharge.

In re Ruttledge's Estate ([1895] I. R. 328) followed.

CASE STATED by Mr. Justice Barton at the Spring Assizes for the county Down, 1900. The case stated was as follows:—

1. The civil bill in this case was brought to recover the sum of £13 11*s.* 4*d.*, for four and a-half gales of tithe rentcharge up to and ending the 1st day of November, 1899, in respect of certain titheable lands situate at Ballyginney, parish of Maghera, and county of Down.

2. The County Court Judge granted a decree against the defendants, Patrick Magorian, Robert James Watson, John Stewart, and Hugh Alexander, for the full amount sued for, and dismissed the case on the merits against the defendant Robert Eakins. The plaintiffs appealed from the said dismiss. The real name of the defendant sued as Robert James Watson is Robert James Watterson.

3. The said lands of Ballyginney are held under a fee-farm grant dated the 30th day of October, 1875, made between William Nevin Wallace of the one part and P. M'Ilroy and Patrick Magorian of the other part. By a sub-grant dated the 16th day of March, 1877, and made between P. M'Ilroy of the first part, ——— Casement of the second part, and Daniel Casement of the third part, the said P. M'Ilroy granted portion of the said lands to the said Daniel Casement subject as therein. The interest

(1) Before MADDEN, BOYD, and KENNY, JJ.

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IRISH LAND COMMISSION v. MAGORIAN.

of the grantor in the said sub-grant is now vested in Robert James Watterson, sued herein as Robert James Watson, and the defendant Robert Eakins, was in the year 1897 entitled to the grantee's interest under said sub-grant.

4. The defendant, Robert Eakins, on the 12th day of February, 1897, duly served an originating notice under the Redemption of Rent (Ireland) Act, 1891, to redeem his rent under said sub-grant or to be deemed a tenant of a present tenancy in said holding held by him under sub-grant and to have a fair rent fixed for said holding; and the said Robert James Watterson, who was then entitled to the grantor's interest under said sub-grant, not consenting to such redemption, by an order of the Court of the Irish Land Commission dated the 27th day of January, 1898, made on the hearing of said originating notice, the said Robert Eakins was deemed a tenant of a present tenancy in said holding, and the fair rent of said holding was fixed at the sum of £19 2*s*., payable half-yearly on each 1st day of May and 1st day of November.

5. The defendant, Robert James Watterson, paid the plaintiffs the proportion of said tithe rentcharge issuing out of the lands of Ballyginney, held under said sub-grant up to the 1st day of November, 1897, and thereupon in the month of January, 1899, issued a civil bill against the defendant, Robert Eakins, for one year's tithe rentcharge to November, 1897, paid by him as aforesaid in respect of the Robert Eakins' said holding. On the hearing of said civil bill the said Robert James Watterson obtained a decree against the said Robert Eakins for the half of said tithe rentcharge due up to the 1st day of May, 1897.

6. By an apportionment order dated the 1st day of December, 1891, and filed on the 10th day of February, 1897, the plaintiffs apportioned the tithe rentcharge sued for in this case as mentioned in said order. And it was proved by the plaintiffs that there was no separate applotment of any portion of the tithe rentcharge sued for in this action on any separate portion of the lands held under said fee-farm grant of 30th October, 1875. The defendant, Robert Eakins, prior to the fixing of said fair rent, paid to the grantor in said sub-grant £1 2*s*. 6*d*. per annum as his proportion of the tithe rentcharge sued for in this case in respect of the lands held by said Robert Eakins under said sub-grant.

7. The defendant, Robert Eakins, contends that, by reason of said originating notice and order made thereon, he is not liable for any part of the tithe rentcharge sued for in this case, and the question for the decision of this Honourable Court is whether the said defendant is liable for any, and if so, for what part of said tithe rentcharge.

In the Pink Schedule which, amongst other documents, was incorporated with the case stated, "Tithe Rentcharge £1 12*s* 6*d*." was specified in the proper column as a "deduction necessitated by special incidents of taxation."

Robert Todd (with him *Ronan*, *Q.C.*), for the Irish Land Commission :—

The point in this case is concluded, so far as this Court is concerned, by the decision of Monroe, J., in *Ruttledge's Estate* (1). The use of authorities or decided cases is thus dealt with by Jessel, M.R., in *Re Hallett's Estate* (2): "There is, perhaps, nothing more important in our law than that great respect for the authority of decided cases which is shown by our tribunals. Were it not for that, our law would be in a most distressing state of uncertainty; and so strong has that been my view, that where a case has decided a principle, although I myself do not agree with it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age and has been used by lawyers as settling the law, leaving to the Appellate Court to say that the case is wrongly decided, if the Appellate Court should think so." *M'Evoy* v. *M'Evoy* (3), in which the status of a lessee becoming a present tenant by the operation of Land Law (Ireland) Acts, 1881 (section 21) and 1887 (section 1) is discussed, is not a decision at variance with the principle laid down in *Re Ruttledge* (1). The facts were different, the question of tithe rentcharge did not arise, and in *Re Ruttledge's Estate* (1), though cited in the argument, was not referred to in the judgment. Since the decision in *Ruttledge's Estate* (1) the practice of the Land Commission in fixing

(1) [1895] 1 I. R. 328. (2) 13 Ch. D. 696. at p. 717.
(3) [1897] 1 I. R. 295.

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the rents of holdings formerly the subject of fee-farm grants has been based upon the assumption that the grantee, after the change of his *status* into a tenant from year to year, is to continue to pay the tithe rentcharge. Dealing with an analogous state of facts in *Palmer* v. *Johnson* (1), Brett, M.R., says: "All the sales by auction which have occurred since these decisions must have taken place on the law which has been so published, and therefore it would be very wrong now for this Court to overrule those decisions. It is true that there are two cases in which Malins, V.C., took a different view of the law. A court of law is not justified, according to the comity of our courts, in overruling a decision of another Court of co-ordinate jurisdiction, and therefore the Vice-Chancellor ought not to have differed from those former decisions."

Section 57 of the Land Act of 1881 defines "Present tenancy." The definition, which is not restricted to any quantum of interest, is wide enough to include any estate in the lands. By section 7 of the 1 & 2 Vict. c. 109, the liability to tithe rentcharge is cast upon the party having the first estate of inheritance. There is no estate of inheritance remaining in the grantor of a fee-farm grant after a fair rent has been fixed: *Irish Land Commission* v. *Holmes* (2). The obligation of the grantee to pay tithe rentcharge is not affected by the fixing of the fair rent, and stands upon the same footing as other obligations which have been held to continue notwithstanding the determination of the lease upon which they depend: *Wilson* v. *Smyth* (3).

D. M. Wilson for the defendant, Robert Eakins:—

In view of the decree against Watterson for this very tithe rentcharge, from which he did not appeal, this is an attempt on the part of the Land Commission to make the tenant Eakins liable for it also. This is impossible, as they cannot both be in possession of the first estate of inheritance in the same lands. In any event Eakins is only liable for a proportionate part of this tithe rentcharge: 63 & 64 Vict. c. 58, sect. 7. By the fixing of the fair rent Eakins' estate of inheritance in the lands under the

(1) 13 Q. B. D. 351, at p. 355. (2) 32 Ir. L. T. R. 85.
(3) 23 Ir. L. T. R. 7.

fee-farm grant determined. It is important to note that the words of the Redemption of Rent Act, 1891, sect. 1, are: "Be *held to be* a tenant of a present tenancy," and not "deemed to be" as in the Acts of 1881 and 1887. This was a grant under the Church Temporalities Act, and the relation of landlord and tenant always existed between the grantor and grantee, and the grant was merely a lease for ever at a rent. These Acts contemplated the determination of such grantee's interest, and there is nothing impossible in such determination. For the position of a grantee who has had a fair rent fixed, see *Mairs* v. *Lecky* (1), and especially the observations of Palles, C.B., at page 485, and of Fitz Gibbon, L.J., at page 488. To hold that the estate of inheritance under the grant continued for any purpose would effect what Walker, L.C., condemned at page 483, viz.: "To remit him (the tenant) to his original *status* as grantee, and to deprive him of the imputed one, on which all his conferred rights rest."

It was also considered in *Glenny* v. *Bell* (2), where Ashbourne, L.C., says a fee-farm grantee who elects to apply to have a fair rent fixed, by his own act claims to have his fair rent fixed as if *his grant had expired.* Fitz Gibbon, L.J., says his position is the same as that of a lessee coming in after the expiration of a term. Walker, L.J., expresses some doubts, but quotes with approval the passage above referred to from the Chief Baron's judgment in *Mairs* v. *Lecky* (1), and Holmes, L.J., says that "he cannot realise the continued existence of a fee-farm grant after every characteristic of that tenure has been taken away." The Land Commission contend that these cases only apply as between landlord and tenant, and that in all other respects the grant still continues to exist. This argument is unsound for three reasons—1, the liability for the tithe rentcharge always depended on the relation between the landlord and the tenant as to tenure in these cases. The tenant was liable if he had the first estate of inheritance till that estate was determined, when, under section 9 of 1 & 2 Vict. c. 109, his landlord became liable; 2, above cases show that the tenants' position is the same as that of a lessee whose lease has expired, and when such a lessee has had a fair rent fixed, only such

(1) [1895] 2 I. R. 475. (2) [1898] 2 I. R. 238.

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provisions of the lease as are not inconsistent with a tenancy from year to year, and the statutory conditions continue to apply *for any purpose*: *Sturges* v. *Ryan* (1); *Wilson* v. *Smyth* (2). The result must be similar as regards the provisions of the fee-farm grant. The Land Act 1896, section 14, confirms this; and compare the Land Commission Rules of March 1897, Order 41; 3, if the argument were correct the tenant has two estates in the land—(*a*) a tenancy from year to year as between him and his landlord; (*b*) an estate in fee under the grant as regards all other persons. The result would be that if the tenant dies intestate, or the landlord determines the tenancy from year to year, or the tenant grants the estate in fee (reserving to himself possession and the tenancy from year to year), the lands will in each case be freed from the tithe rentcharge; for in each of these cases the owner of the first estate of inheritance is neither in possession of the lands nor in receipt of any rent out of the lands; and the only way the lands can be made liable for tithe rentcharge are by distress if the owner of the first estate of inheritance is in possession of the lands, or by getting a receiver appointed over the rents received by such owner if he is not in possession of the lands—a disastrous result for the Land Commission who are the great tithe owners in Ireland now. Moreover, the point has been actually decided by Courts of co-ordinate jurisdiction in favour of my contention on four distinct occasions, viz. by a Divisional Court on a case stated in *Moroney* v. *Ambrose* (3); by the Vice-Chancellor in *Gray* v. *Gray* (4) and *In re Parke* (5), and by the Master of the Rolls in *M'Evoy* v. *M'Evoy* (6). The only case in which the opposite conclusion was arrived at, was *In re Ruttledge's Estate* (7). I submit this decision cannot be upheld. It is contrary to all the above decisions. *Moroney* v. *Ambrose* (3), a decision of the Divisional Court on the very point—was not cited in the argument or noticed in the judgment. The decision was expressly based on the case of *Mollan* v. *Kiernan* (8), which has since been expressly overruled by the Court of Appeal in *Mairs* v.

(1) 24 L. R. Ir. 305.
(2) 23 Ir. L. T. R. 7.
(3) 32 L. R. Ir. 63.
(4) [1894] 1 I. R. 65.
(5) 1 Ir. W. R. 168.
(6) [1897] 1 I. R. 295.
(7) [1895] 1 I. R. 328.
(8) [1894] 2 I. R. 27.

Lecky (1). The case was decided behind the back of the only person who was interested in the decision, viz. the tithe owner, and lastly it was a decision by the Judge of the Landed Estates Court on a subject matter, viz. tithe rentcharge, in respect of which he had no jurisdiction; *In re Barnewall's Estate* (2), and *In re Bailie's Estate* (3). Under these circumstances, this Court is not bound to follow *In re Ruttledge* (4), as contended, but must follow *Moroney* v. *Ambrose* (5), the decision of a Court similarly constituted to the present Court and the decisions of the Vice-Chancellor and Master of the Rolls, to the same effect. In addition the Land Commission say that since the decision of *M'Evoy* v. *M'Evoy* (6), they have been anxious to get a decision as to whether *M'Evoy* v. *M'Evoy* (6), or *In re Ruttledge* (4), was to be followed in future, and this present case was stated for that purpose, and therefore the argument that *In re Ruttledge* (4) is binding on this Court is not open to the Land Commission here.

Ronan, Q.C. in reply:—

Moroney v. *Ambrose* (5) where the point for decision was whether the effect of the fair rent order was not to carry on liability to tithe rentcharge beyond the duration of the original estate, is no authority in this case. I am authorized by the Land Commission to state that they held the view expressed in *Ruttledge's Estate* (4) and acted upon it long before Mr. Justice Monroe's decision. Since *Ruttledge's Estate* (4) and down to the present time the Land Commission has held that the tenant or grantee still remains liable to tithe rentcharge. About the beginning of last year, however, it was suggested that *M'Evoy* v. *M'Evoy* (6), overruled *Ruttledge's Estate* (4). The Land Commission considered the matter and held that as *Ruttledge's Estate* (4) was a decision upon the precise question, and was not referred to by the Master of the Rolls, they were still bound to follow it, but offered to state a case for the Court of Appeal. The parties were not willing to take a case stated and the Court of the Land Commission, in order to prevent any possible

(1) [1895] 2 I. R. 475.
(2) I. R. 1 Eq. 304.
(3) 31 L. R. Ir. 373.
(4) [1895] 1 I. R. 328.
(5) 32 L. R. Ir. 63.
(6) [1897] 1 I. R. 295.

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injustice, took down on the face of the order that the tenant undertook during the statutory term to pay the tithe rentcharge. In any case in which the same question has arisen the same undertaking has been given, and in every case the parties have acquiesced in the decision. The fair rent is, as a matter of practice, fixed by the Land Commission on the assumption that the grantee continues to pay the tithe rentcharge after the order fixing the fair rent has been made.

In re Ruttledge's Estate (1) is a decision of a Court of co-ordinate jurisdiction and should be followed by this Court until overruled by the Court of Appeal: *Leech* v. *North Staffordshire Railway Company* (2) and *Julius* v. *Bishop of Oxford* (3). The result of these decisions is that the only cases in which the Court is justified in overruling a Court of co-ordinate jurisdiction are—1, where the decision is clearly wrong; and 2, where there is no right of appeal.

The proper question for the Court to ask itself is what was the scope of the legislation? I submit that its scope was to alter the relations of landlord and tenant *inter se*, and it lies upon those who suggest that it alters the rights of other parties to show some intention to that effect upon the face of the statute. No such intention has been shown.

Dec. 1.

MADDEN, J.:—

The case stated for the decision of this Court involves the question of the liability to rentcharge of an interest in certain titheable lands which is now vested in the defendant Robert Eakins. This defendant prior to the year 1897 held the lands in question under a sub-grant in perpetuity executed pursuant to the provisions of the Church Temporalities Acts. As the person having the first estate of inheritance in titheable lands, he was clearly liable to the payment of tithe rentcharge under the provisions of the 7th section of the Tithe Rentcharge Act, 1 & 2 Vict. c. 109.

Availing himself of the provisions of the Redemption of Rent Act, 1891, the defendant Eakins served an originating notice which resulted in an order of the Land Commission dated the

(1) [1895] 1 I. R. 328. (2) 29 L. J. Mag. Cas. 150, at p. 155.
(3) 5 App. Cas. 214.

27th June, 1898, by which he was deemed to be a present tenant, and a fair rent was fixed for the lands which had been comprised in the sub-grant.

It is contended on the part of the defendant Eakins, that this grant must be taken as non-existent for any purpose, and that upon its statutory extinction he ceased to be the owner of a responsible estate, within the meaning of the Tithe Rentcharge Act. It must now be taken as finally settled that, as between him and his landlord, the legal *status* of Eakins is, for all purposes, that of a tenant from year to year. It is not necessary to go through the process of reasoning by which that result has been attained. An exhaustive examination of the provisions of the Redemption of Rent Act, the Land Law Act of 1887, and the Land Act of 1881, bearing upon this question will be found in the judgments of the members of the Court of Appeal in the cases of *Mairs* v. *Lecky* (1), and *Glenny* v. *Bell* (2). It is sufficient to state as the net result of these cases that as between Eakins and his landlord the perpetuity grant, as such, and the tenure which it created, ceased to have any existence on the fixing of a fair rent.

Mr. Wilson was able to carry his argument a stage further, and to show us on authority, that the former tenure is to be taken as determined, not only as between landlord and tenant, but as between the heir-at-law and personal representatives of a grantee having a fair rent fixed under these statutes, and dying intestate: *M'Evoy* v. *M'Evoy* (3). The Master of the Rolls, in coming to this conclusion, reviews the previous decisions, and concludes in the following words:—"If a lessee under the Act of 1887 elects to go into the Land Court, and obtains an adjudication relieving him from the estoppel of his lease as to rent, and determining what his rent is to be, as if he were a yearly tenant, he is thenceforth to be deemed to be, and therefore shall be in contemplation of law, a present tenant with all the consequences of that *status*." The lessee in that case held for an estate *pur autre vie* limited to heirs, but the decision applies to the grantee in the present case.

As to this decision, Mr. Ronan observed that the decision of

(1) [1895] 2 I. R. 475. (2) [1898] 2 I. R. 233.
(3) [1897] 1 I. R. 295.

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the Master of the Rolls was largely founded on the judgment of Walker, L.C., in *Connolly* v. *Tyrrell* (1), referred to at page 301 of the report; and he quoted a passage from the judgment of the same learned Judge in *Glenny* v. *Bell* (2) in which he expressly forbears from expressing an opinion upon a question analogous to that which arose in *M'Evoy* v. *M'Evoy* (3), that is to say, the position of a doweress, a widow of a former owner of the fee-farm. However this may be, the decision of the Master of the Rolls is a distinct authority for the proposition that the fee-farm grant was determined for certain purposes outside those with which the land code is primarily concerned—namely, the regulation of relations between landlord and tenant.

We are now asked to take a step further, and to apply the provisions of the land code to a totally different class of relation, with the result that the rights of the tithe owner have been affected by a proceeding to which he was no party.

And here it may be sufficient to say that this question also is closed by authority. The precise point was decided by Monroe, J., in the following words:—"Answering, therefore, the question submitted to me, I am of opinion and so decide that the liability of a grantee under a fee-farm grant to pay the tithe rentcharge is not altered by an order fixing a fair rent under the Redemption of Rent Act, 1891": *In re Ruttledge's Estate* (4). It is quite true that the recent decisions to which I have referred have displaced much of the reasoning of the learned Judge; but I cannot find that his decision has been questioned in any subsequent case. It was cited in *M'Evoy* v. *M'Evoy* (3), and I must conclude that the Master of the Rolls adopted the argument which was addressed to him distinguishing it from the case before him, for he does not notice it in his judgment. The decision in *Ruttledge's Estate* (4) has been the foundation of dealings with property for several years. Rentals have been settled and estates sold in accordance with it, and we know from the documents before us in the present case, and from information furnished to us, that the practice of the Land Commission is in accordance with that decision; and that the fair rent

(1) 32 L. R. Ir. 97.
(2) [1898] 2 I. R. 233, at p. 240.
(3) [1897] 1 I. R. 295.
(4) [1895] 1 I. R. 328.

is as a matter of practice fixed on the assumption that the grantee continues to pay the tithe rentcharge after the order fixing the fair rent has been made. The defendant in the case before us, when applying to have a fair rent fixed, set forth the proportion of tithe rentcharge which he had been in the habit of paying as an outgoing incident to his tenure; and his rent was fixed on the assumption that the tithe rentcharge would continue to be paid by him.

The decision of the Court of Exchequer in *Moroney* v. *Ambrose* (1) is relied on as an authority in conflict with the decision of Monroe, J. But when this case is examined it appears that the real question in dispute was the liability of the tenant to the rentcharge after the determination of his lease. This is clearly stated by Andrews, J., who treats the question of liability between this date and the fixing of the fair rent as one of very small pecuniary importance, which was not argued.

The decision in *In re Ruttledge's Estate* (2), taken in connexion with the course of dealing and the practice which it has given rise to in the Land Judge's Court and in the Land Commission affords a good example of the class of decisions on property law which even the ultimate Court of Appeal is slow to disturb. It was theoretically possible, but rather improbable, when the case of *Koe* v. *Clifford* (3), came before the House of Lords, that any one had dealt with land on the faith of a decision on the Rule in *Wild's Case* (4) made by the Court of Common Pleas in England in the year 1801. And yet, as a decision on property law, the judgment of the inferior tribunal was treated as an authority that ought to be followed: *Koe* v. *Clifford* (3). It is absolutely certain that property has been sold and rents have been fixed for several years on the assumption that the law is as laid down in *In re Ruttledge's Estate* (2). Lord Cairns, dealing with a decision regulating the course of practice in Bankruptcy, stated that decisions ought not to be altered without the very strongest reasons, where property had changed hands, and parties had acted on the authority of those decisions: *Bill* v. *East and West*

(1) 32 L. R. Ir. 63.
(2) [1895] 1 I. R. 328.
(3) 5 App. Cas. 447.
(4) 6 Rep. 16 b.

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India Dock Co. (1), and Lord Blackburn in another case went so far as to say, referring to a decision on conveyancing law, that "where there is reason to believe that rights have been regulated, and arrangements as to property made, on the basis of the decision, it may be right to uphold it, even though convinced that it was originally wrong": *Davidson* v. *Sinclair* (2). I need hardly point out that these observations apply with greater force when we are asked to review the decision of a Court of co-ordinate jurisdiction. In such a case it is plainly our duty to adopt the law as settled by that decision, whether we agree with it or not.

I perform this duty in the present case with the greater satisfaction, because I believe that the decision of Monroe, J., in *Ruttledge's Estate* (3) is right, and that it is not inconsistent with the later decisions of the Master of the Rolls and of the Court of Appeal. The Redemption of Rent Act is part of the landlord and tenant code of this country, and, in the absence of express enactment, it ought to be regarded as dealing exclusively with the relation of landlord and tenant. On this principle it was held, notwithstanding the general language of the Act, that it did not apply to the grantee under a fee-farm grant at Common Law by which this relation was not created: *Kelly* v. *Rattey* (4). Referring to this decision, Palles, C.B., said in a subsequent case, "I am of opinion that in order to bring himself within the Act of 1891, any fee-farm grantee must show that there exists between him and the person to whom he pays his rent some relation of landlord and tenant": *Adams* v. *Alexander* (5). An express enactment was required in order to extend its application to cases which were regarded as coming within the spirit of the land code, a consideration which is plainly inapplicable to the relation of tithe-owner and tithe-payer (Land Law Act, 1896, sect. 14 (*b*)). Mr. Ronan has noted that the decision in *In re Ruttledge's Estate* (3) was reported before the passing of this statute, and although it deals with certain matters relating to the Redemption of Rent Act and to tithe rentcharge, it leaves

(1) 8 App. Cas. at p. 457.
(2) 3 App. Cas. at p. 788.
(3) [1895] 1 I. R. 328.
(4) 32 L. R. Ir. 445.
(5) [1895] 2 I. R. at p. 371.

untouched the question of the liability of a tenant who becomes a present tenant under the provisions of the Redemption of Rent Act.

Mr. Wilson contends that no injury can be done to the tithe-owner, inasmuch as the liability to tithe rentcharge is transferred to the next estate of inheritance by the 9th section. But suppose there is no immediate estate of inheritance? Suppose the fee to have been originally vested in the tithe-owner, as in the present case, and that the grantee under an immediate perpetuity grant from the Ecclesiastical Commissioners, or their successors in title the Land Commission, has had a fair rent fixed under the Redemption of Rent Act. As between himself and the Land Commission he becomes for all purposes a tenant from year to year. If the 9th section were called into operation in such a case, the tithe rentcharge would be merged and extinguished. The only way in which it could be preserved would be to attribute to the operation of the Land Law Acts a statutory transformation of the responsible estate of inheritance into a special kind of equivalent estate, that is to say a yearly tenancy held immediately under the tithe-owner.

In view of these and similar questions an intelligent reason can be assigned for the language used by the Legislature when it enacted that the lessee or grantee who has a fair rent fixed is to be "held" or "deemed" a present tenant. The recent cases have decided that this mental process must be complete and absolute, as regards landlord and tenant in their mutual relations, and also, according to *M'Evoy* v. *M'Evoy* (1), as regards the estate of the tenant. But what is enacted is a notional, and not an actual, determination of the lease or fee-farm grant. If the Legislature had enacted that the lease or fee-farm grant should determine or be extinguished on the fixing of a fair rent, it might not be possible to avoid the conclusion that effect must be given to this statutory operation as against the whole world, including the tithe-owner. But I see no reason why the constructive or notional determination of the grant should be extended beyond the purposes of the land code to persons other than the

(1) [1897] 1 I. R. 295.

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landlord and tenant, singly, or in their mutual relation. For these reasons I am of opinion that the liability of the defendant to tithe rentcharge is unaffected by the order of the Land Commission fixing a fair rent of his holding.

BOYD, J.:—

I do not consider it necessary to deliver any judgment in detail on the subject which has just been so admirably dealt with by my brother Madden. I entirely concur in that judgment, and I also concur in the judgment of Mr. Justice Monroe in *Ruttledge's Estate* (1). In my opinion the Land Acts only deal with the contractual relations between the landlord and tenant, and do not affect outside interests.

KENNY, J.:—

I concur in thinking that we should follow the decision in *Ruttledge's Estate* (1), and hold that the defendant is liable for the tithe rentcharge which is the subject of the civil bill.

Ruttledge's Estate (1) is a direct authority on the point we have to consider, and though there are dicta of Judges at variance with what is established by it, it has never been overruled. It is the decision of a most able and painstaking Judge—the late Mr. Justice Monroe—pronounced in the year 1894, and acted on, as we know from the memorandum received from the Land Commission, in all cases since that date where fair rents are fixed under the Redemption of Rent Act of 1891 and the Land Act of 1896. In the present case we have had before us a copy of the Pink Schedule, on the basis of which the judicial rent was arrived at, and there can be no doubt that the latter was fixed on the assumption that the defendant was to continue liable for the tithe rentcharge. The gross rent is given and the tithe rentcharge deducted from it. I imagine that in the Land Judge's Court the practice as settled by this decision has been also followed. Property has changed hands, and the new relations between landlord and tenant have been fixed, on the basis of the

(1) [1895] 1 I. R. 328.

recognition of the law as laid down in that case; and even if we disagreed with the decision, I doubt if we would be justified in not following it: *Bailie's Estate* (1). But, furthermore, it is a decision of a Court of co-ordinate jurisdiction with this Court, and by the comity which exists between such Courts, I would feel bound to follow it, leaving it to the Court of Appeal to reverse the principle decided by it should it think fit: *Leech* v. *Staffordshire Railway Co.* (2), *Julius* v. *Bishop of Oxford* (3), *Hallett's Estate* (4), *Palmer* v. *Johnson* (5). But the arguments in the present case as to the correctness of the principle have been so thorough that I think the parties are entitled to somewhat more than a mere adoption of this case as an authority binding on us, and that they may fairly expect an expression of opinion from us as to our concurrence in the conclusions arrived at by Monroe, J.

Stanley's Act declared that the first estate of inheritance—or in certain cases what is called the "equivalent estate"—is to be liable to the tithe rentcharge. *Ruttledge's Estate* (6) decided that though as between landlord and tenant there are an imputed new tenure and imputed new relations for the purposes of the Redemption of Rent Act, the original character of the tenure was for other purposes unaltered, and that the estate created by the fee-farm grant continued to exist for these purposes and to be still the first estate of inheritance. The grantee of the fee-farm grant on making the prescribed application is, as the result of the combined sections of the three Acts of 1891, 1887, and 1881, to be deemed a tenant of a present tenancy as if his grant had expired, and his holding is thenceforth to be subject to all the provisions of the Act of 1881 with regard to present tenancies as if the tenancy therein were a tenancy from year to year. Is the effect of fixing a judicial rent to at once alter the character and quality of the pre-existing tenure for all purposes and to turn an estate of freehold into a mere chattel interest in the lands, with all the legal incidents flowing from such a change—or merely to *deem* the grantee to be a yearly tenant for the purpose, and no other, of attaching to the imputed interest all the provisions of the Act of

(1) 31 L. R. Ir. 373.
(2) 29 L. J. Mag. Cas. 150.
(3) 5 App. Cas. 214, p. 239.
(4) 13 Ch. D. 696.
(5) 13 Q. B. D. 351.
(6) [1895] 1 I. R. 328.

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Kenny, J.

1881 which would be applicable to a yearly tenancy? As Fitzgibbon, L.J., has said in *Looby* v. *Finch* (1), the form of legislation that is adopted is a most distracting one in deeming persons to be what they are not, and I think that, unless we are coerced by the language of the Acts to say that the estate of inheritance has wholly vanished, we ought to endeavour to maintain its continued existence. If the judicial tenant has taken the place of the freeholder, where is the fee? Has it expired or determined, and if such a thing as expiration of the fee-simple as vested in the tenant be possible, has all liability for tithe rentcharge vanished with it? If it is "determined" in the hands of the tenant, does the law applicable to escheat apply, and is there a reverter, and if so, is it to the Crown? On the other hand, has there been a transmigration of estate, and if so in favour of whom, and by what means has it been effected? It could not well be suggested that henceforth no estate in the lands is to be subject to tithe rentcharge, and therefore it is essential to put one's legal finger on the particular estate and the owner of it, which, from the moment the judicial rent is fixed, become liable to pay. Can it be said that the grantor in the fee-farm grant or whoever may be the legal recipient for the time being of the new rent is the person liable? If so it must be by reason of such person having the first estate of inheritance in the lands. Up to the fixing of the judicial rent he had no such estate. The moment the fee-farm grant was executed all the grantor's estate passed away from him. Otherwise there might be two estates in fee—a thing impossible: *Irish Land Commission* v. *Holmes* (2). How then does it get back to him? There is no language to be found in any of the Acts that constitute the Irish land code which could be interpreted as equivalent to a statutory revesting in the grantor or his real representative. These are difficulties which I feel it impossible to surmount, and it seems to me that the object of the Legislature can only be achieved without inconvenience and without doing violence to language by holding that the fee-simple still remains vested in the only person who by any possibility can have it, namely, the new judicial tenant; and that in his relations with his grantor he is to be

(1) 30 L. R. Ir. 568. (2) 32 Ir. L. T. R. 85.

regarded as if he were a yearly tenant subject to the provisions of the Land Act of 1881. The creation of a new *status* restricted to a limited purpose, namely, the conferring on the grantee of the advantages acquirable under the Land Acts, seems to me to be more in conformity with the scope and objects of these Acts and to be a more reasonable and convenient construction of the code than the extinguishment or transfer of existing estates, when there is no language that I can see to justify such an interpretation, and when, if it were the correct one, a small revolution would be effected in the rights of doweresses and tithe rent-charge owners.

It is but due to the careful argument, presented by Mr. Wilson for the defendant, to refer shortly to the authorities. Under the Act of 1881, the mere fixing of a fair rent in the case of a yearly tenancy regulated by the provisions of a written document did not affect the latter save so far as they might be inconsistent with the provisions of the Act. The rent was altered, the old tenancy continued—but in new attire: *Bruce* v. *Steen* (1); *O'Connor* v. *Smith* (2). By the 21st section of the Act of 1881, on the expiration of the term in a lease the lessee is to be deemed a present ordinary tenant from year to year, subject to the conditions of the lease so far as such conditions are applicable to yearly tenancies. I think there can be no doubt that for all practical purposes the tenant in this latter case, through the imputed estate, becomes in substance a yearly tenant. Without the section he would have no estate when his lease expired. The section creates an estate for him—but yet, it is but an imputed one. Under the Act of 1887, section 1, the leaseholder who gets a fair rent fixed does not, in my opinion, thereby annul his lease for all purposes. Its conditions are to prevail where they are not inconsistent with the Act of 1881. This was the view of the late O'Brien J., in *Wilson* v. *Smith* (3), and of Murphy, J., in *Sturges* v. *Ryan* (4), while Johnson J., in the latter case, seems to have thought that the lease must be considered as gone for all purposes. In that case also, Gibson, J., while being of opinion that the fixing of a fair rent

(1) 14 L. R. Ir. 408.
(2) 20 L. R. Ir. 393.
(3) 23 I. L. T. R. 7.
(4) 24 L. R. Ir. 305.

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did not *per se* destroy the original liability of a tenant on his contract, did not consider it proper, unnecessarily, to express any opinion as to how far the statutory hypothesis in the first section of the Act of 1887 was to be deemed to operate. It was clear that, in terms at least, it did not extinguish or accelerate the expiration of leases in fact. In 1893 the question of tithe rentcharge was raised on a case stated before Andrews, J., in *Moroney* v. *Ambrose* (1). *Bruce* v. *Steen* (2) and *O'Connor* v. *Smith* (3) were cited, and Andrews, J., expressed the opinion that the liability to tithe rent ceased when the application to fix the fair rent was made. In that case the estate was one for lives, and the last life survived the date of the application, so that the learned Judge's opinion must be taken as being opposed to that subsequently pronounced by Monroe, J., in *Ruttledge's Estate* (4). Neither *Moroney* v. *Ambrose* (1), nor *Smyth* v. *Moore* (5), nor *Sturges* v. *Ryan* (6), appears to have been brought to the notice of the Judge in the latter case. *Smyth* v. *Moore* (5), was a case between landlord and tenant, and decided that a tenant did not acquire the *status* of a present tenant by the mere service of an originating notice. It did not purport to deal with the question whether the imputed *status* of a yearly tenant was the real *status* of the tenant as against others than his landlord. *Connolly* v. *Tyrrell* (7), is open to somewhat similar observations with, it is right to say, this additional observation of Fitz Gibbon, L.J. that section 1 of the Act of 1887 enables lessees "to expedite the expiration of their leases." That is, as between them and their landlords. As to *Mairs* v. *Lecky* (8) it was a case of landlord and tenant, and Walker, L.C., in giving judgment, deals only with *imputed* status. The Chief Baron says:—"The 1st section of the Act of 1891 made determinable, and treated as actually determined, the perpetual estate conveyed by the grant, and converted the grantee into a lessee who had held under an expired lease. . . . Thus, *in so far as necessary for the purpose of fixing the fair rent* he is to be deemed not only to be a tenant—but to have been such tenant from the execution

(1) 32 L. R. Ir. 63.
(2) 14 L. R. Ir. 408.
(3) 20 L. R. Ir. 393.
(4) [1895] 1 I. R. 328.
(5) 32 L. R. I. 129.
(6) 34 L. R. Ir. 305.
(7) 32 L. R. Ir. 97.
(8) [1895] 2 I. R. 475.

of the fee-farm grant." I do not understand from this language that the Chief Baron intended to give any opinion on this most difficult question of *status*, further than was required in a proceeding between landlord and tenant. It is also to be observed that neither *Ruttledge's Estate* (1) nor *Moroney* v. *Ambrose* (2) was cited, or referred to in the judgments, and it is not unreasonable to infer that the decision was not intended to conflict with the former of these two cases.

Two very important authorities remain, viz. *M'Evoy* v. *M'Evoy* (3) and *Glenny* v. *Bell* (4). In the former the Master of the Rolls held that on the death intestate of a former lessee for lives who had got a judicial rent fixed under the Act of 1887, his interest in the holding went—not to his heir—but to his personal representative. The entire of the reasoning in the Master of the Rolls' judgment is in the direction of holding that there is an absolute and complete change of *status* and not a mere imputed one. I recognize the decision as one in direct conflict with that of Monroe, J., yet although the latter appears to have been cited in the argument it is not even glanced at in the exhaustive judgment. The two cases cannot stand together, and yet I cannot think that the Master of the Rolls intended to expressly differ from Mr. Justice Monroe's conclusion. I feel confident that if he did he would have not only referred to but thoroughly discussed the case. In *Glenny* v. *Bell* (4) the decision of Bewley J., which was under appeal, apparently was opposed to the view of the Master of the Rolls in *M'Evoy* v. *M'Evoy* (3). In discussing the two cases, Walker, L.J., forbears to express any definite opinion on the subject or "till necessary, to face the difficulties which will arise, in considering the position of, say a doweress, a widow of a former owner of the fee-farm, or a mortgagee in fee of the fee-farm interest." Holmes, L.J., grappled with the question and expressed a very decided opinion. He agreed with the Master of the Rolls, and added, that he could not realize the continued existence of a fee-farm grant, after every characteristic of that tenure had been taken away. This *dictum* of Holmes, L.J., is stated by himself to be immaterial to the decision

(1) [1895] 1 I. R. 328.
(2) 32 L. R. Ir. 63.
(3) [1897] 1 I. R. 295.
(4) [1898] 2 I. R. 233.

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of the case before him, and *Ruttledge's Estate* (1) receives neither comment nor mention.

In these circumstances I cannot say that Mr. Justice Monroe's decision has been overruled. I concur for the reasons I have given, in the principle it decided and I consider that we should follow it and hold that the defendant still remains owner of the first estate of inheritance within the meaning of Stanley's Act. If it should hereafter be held by the Court of Appeal that the judicial tenant ceases to be liable on getting a fair rent fixed, I confess I do not envy the task of the tribunal that will have to start on a bewildering journey in search of the first estate of inheritance liable to tithe rentcharge.

Solicitor for the Irish Land Commission: *J. Hunter Moore.*
Solicitors for Robert Eakins: *Crawley & Forrest.*

J. L.

(1) [1895] 1 I. R. 328.

FISHER *v.* *NATION* NEWSPAPER COMPANY, LIMITED, AND REV. JOHN ROONEY (1).

Q. B. Div. 1900.

May 14, 16.

Appeal. June 13, 14, 25.

Defamation—Libel—Pleading—Innuendo—Finding of jury against innuendo but that words were a libel.

A plaintiff in an action of libel set out the words complained of in his statement of claim and imputed an actionable meaning to them by an innuendo, but did not aver that they were libellous *per se*. The defendant pleaded that the words were no libel, traversed the innuendo, and pleaded privilege and fair comment. The jury found against the innuendo, but found that the words were a libel, that they were not fair comment, and that the defendants had acted maliciously, awarding £50 damages. The Judge at the trial thereupon entered the verdict and judgment for the plaintiff:—

Held by the Court of Appeal (reversing the decision of the Queen's Bench Division) that the course taken by the learned Judge at the trial was right, and that the plaintiff was entitled to the verdict and judgment.

MOTION that the verdict and judgment entered in the action for the plaintiff be set aside, and that the verdict and judgment be entered for the defendants, or for a new trial.

In an action for libel the plaintiff delivered a statement of claim, the material portions of which were as follows:—

1. "The plaintiff is a shipowner and merchant, residing in and carrying on business in Newry, and was an elected guardian of the poor for the Newry Poor Law Electoral Division of the Newry Union for the years 1896–97 and 1898–99, prior to the events hereinafter complained of. Plaintiff was and is also a member of several other boards, public and private, in the said town of Newry.

2. "The defendants the *Nation* Newspaper Company, Limited, are the proprietors, printers, and publishers of a newspaper called *The Daily Nation*, published by them at their registered office, No. 90, Middle Abbey-street, Dublin, and the defendant

(1) In the Queen's Bench Division, before SIR P. O'BRIEN, L.C.J., and JOHNSON and KENNY, JJ.

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John Rooney is a Roman Catholic clergyman, residing in and officiating in the parish of Newry, and attached as a curate thereto.

3. "At the time of the grievances hereinafter mentioned, the plaintiff was a candidate for one of the three then vacant seats as Poor Law Guardian for the West Ward of the Newry Urban District.

4. "The defendants falsely and maliciously wrote and published, and procured to be printed and published, of and concerning the plaintiff, the words following, that is to say:—

"Don't vote for Mr. Joseph Fisher, because this gentleman has been as intolerant and exclusive at the workhouse as Mr. John Quinn Henry. When did Mr. Fisher at any public board vote for a Catholic applicant if one of another religion applied? . . . Take the treatment recently meted out to Mr. Connolly, veterinary surgeon, by the bigotry of the Newry Guardians. Mr. M'Loughlin applied, with qualifications far superior to any other, for the last vacant mastership. He was rejected, not because he was disloyal or a politician, but because he was a Catholic. Mr. Fisher—the man who looks for your votes now—those votes he and his party tried to cheat you of—voted against Mr. M'Loughlin. Vote against Mr. Fisher as a protest against his own bigotry, as well as that of the old Newry guardians,"

meaning thereby that the plaintiff as a member of public boards and in his capacity of Poor Law Guardian had acted and voted from prejudiced, bigoted, intolerant, and unworthy motives in the appointment of servants and officials, and generally in the performance of his duties as a member of said boards had ostracised and boycotted Catholics, and, irrespective of merit, had treated them, on account of their religion, unfairly and unjustly.

"Mr. Fisher is enriched by the toil of the Catholic workingmen. He wishes them to vote for him that he may use his influence as a public man to keep his feet upon the necks of Catholics and crush them down,"

meaning thereby that the plaintiff had acted unjustly, and from bigoted and intolerant motives to the prejudice of Catholics, his own workmen, and was thereby unfitted for public office and position.

"Mr. Fisher and his 'Lumper' M'Cartan broke up the Labourers' Union, and left the poor quay porters without their legitimate means of defence against capitalist extortion,"

meaning thereby that the plaintiff as a merchant and employer of labour, had acted unfairly towards the quay porters.

"Men and women of Newry who have votes, are you going to sell your conscientious and religious convictions by voting for a man who, if he had the power, would trample your religion, and you who belong to it, in the dust?"

meaning thereby that the plaintiff was unfitted, through bigotry and intolerance, from acting as Poor Law Guardian or filling any public office of influence, and would misuse the said position in favour of bigotry and intolerance.

"Don't sell your conscience and your honour for any filthy consideration or the hope of any passing little gain,"

meaning thereby that the plaintiff sought to be elected as said Poor Law Guardian by corrupt and illegal practices and bribery.

5. "The plaintiff further complains that the defendants falsely and maliciously wrote and published, and procured to be printed and published, of and concerning the plaintiff, the words following, that is to say:—

"There are strong evidences that during his time at the Poor Law Board of Newry he gave votes which strongly savoured of bigotry. Why did Mr. Fisher on the 14th of last January vote for a Protestant nurse of three years' standing in preference to a Catholic nurse from Donegal of thirteen years' standing? Why did he vote for Miss West, a Protestant minor, and refuse his vote to Miss O'Keefe, who was not a minor but a Catholic lady from the West Ward and a neighbour of Mr. Fisher's?"

meaning thereby that the plaintiff as a Poor Law Guardian voted corruptly and unjustly, and acted from motives of bigotry and intolerance in the appointment of Poor Law officials and servants.

"This Mr. Fisher who now asks Catholics to support him was one of those Poor Law candidates who helped to extinguish representation for the Catholic poor of Newry in the Newry Workhouse,"

meaning thereby that the plaintiff, from corrupt and intolerant motives, extinguished the representation, and wrongly deprived

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electors of Newry Union of proper representatives on their Poor Law Board, to the injury and hurt of the poor of the said Union.

6. "In consequence of the premises the plaintiff has been and is greatly injured in his credit and reputation, and was defeated in his candidature at said election. In respect of the causes of action set forth herein, the plaintiff claims damages against the defendants £1000."

The defendants severed in their defences.

The *Nation* Newspaper Company, Limited, pleaded, 1, that they did not write or publish, or procure to be written or published, the words complained of; 2, that the said words did not refer to the plaintiff; 3, that the said words were not written or published with, nor do they bear, any of the meanings alleged by the plaintiff; 4, that the said words were no libel; 5, that the said words were printed and published in these defendants' newspaper, *The Daily Nation*, on the occasion in the third paragraph of the statement of claim mentioned, and were and are fair and *bona fide* comment upon matters of public interest, viz. the conduct of the plaintiff in his public capacity, and the said words were published by these defendants without malice, and the publication thereof was for the public benefit; 6, the plaintiff did not suffer any such damage as alleged; 7, the alleged damage was not caused by the writing and publishing of the said words.

The defendant the Rev. John Rooney pleaded that the words complained of were no libel, traversed the innuendoes, and pleaded privilege and fair comment in the following terms:—(*a*) At the time of the publication of the words complained of in paragraphs 4 and 5 of the statement of claim, the plaintiff was a candidate for the position of Poor Law Guardian for one of the Wards of the Newry Urban District, and had previously been a Poor Law Guardian, representing the town of Newry at the Poor Law Board. The said defendant is an elector of the said Newry Urban District, and is a Catholic clergyman in the town of Newry, and the words complained of in the said paragraphs were written and published by the said defendant, he having an interest and a duty in the said matter, and the

other electors for whom the words were published having an interest also therein with reference to the candidature of the said plaintiff, which is the occasion complained of, and were printed and published by the said defendant without malice, and *bona fide* believing the same to be true, which are the grievances complained of; (*b*) the words complained of in paragraphs 4 and 5 of the statement of claim were a fair comment on a matter of public interest, and on the conduct and candidature of the plaintiff on the occasion complained of.

At the trial before Mr. Justice Gibson the plaintiff proved that he was not a member of the Board when M'Loughlin was a candidate, and denied that he had acted on the Board of Guardians from the motives imputed to him by the manifesto published by the defendants. No evidence to support the innuendoes other than that of the plaintiff himself was given. The joint publication of the manifesto was admitted by the defendants. This closed the plaintiff's case. Counsel for the defendants then asked for a direction on the ground (1) that the occasion was privileged, and (2) that the innuendoes were not proved. The learned Judge refused to direct the jury.

The defendant the Rev. J. Rooney was then called, and after he had given evidence, stating that he had written the manifesto without malice, and believing it to be true, the requisition for a direction was renewed.

The learned Judge again refused to give the direction, and stated that he proposed to put the following questions to the jury:—

1. Were the publications complained of, or some, and which of them, libels?

2. Did they bear the defamatory meanings imputed by the pleadings, or some, and which of them?

3. Was what is complained of honest fair comment on matters of public interest?

4. To what damages (if any) is plaintiff entitled?

5. Did the defendants act maliciously?

Counsel for the defendants objected to the first question on the ground that the cause of action was based on the innuendoes.

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The jury answered the questions as follows:—

1. Yes: one of the statements in the manifesto, viz. the two paragraphs respecting the candidature of M'Loughlin.

2. The jury considers the innuendoes all too strongly worded.

3. No.

4. Fifty pounds.

5. Yes.

The Judge's report stated that "upon the answers defendants' counsel contended that the verdict and judgment should be entered for them. The answers seemed to put an end to any question of fair comment, as the statement found to be libellous was admittedly false in fact. As to the innuendoes, before commencing my charge I suggested that they only tended to embarrass the jury, and that any question as to them should be struck out. Plaintiff's counsel assented to this, but as defendants' counsel did not agree, I let the question stand. The English and Irish pleading rules are the same, and it being settled in England that innuendoes are severable from the libel, I directed verdict and judgment for the plaintiff. I have acted on this view, and so I believe have other Judges for many years. Serjeant Dodd, however, stated that a different opinion was entertained by distinguished members of the Bench, and I stayed execution. The point is not usually one of substance, as there being no surprise an amendment could be made. No amendment was asked for, nor did I think it necessary."

The Judge's certificate set out the questions submitted to the jury and their answers thereto, and proceeded, "Whereupon the jury, having pointed out and marked the paragraphs in the manifesto referred to in the first answer, found for the plaintiff as to the cause of action in the first alleged libel, from the words 'Mr. M'Loughlin applied,' to the words, 'voted against Mr. M'Loughlin,' with £50 damages, and for the defendants as to the residue of the action. The Judge gave judgment for the plaintiff for £50 with costs as to to the portion of the alleged libels on which the jury had pronounced a verdict in his favour, and for the defendants with costs as to the residue of action."

Serjeant Dodd and *Williamson*, for the defendant the Rev. J. Rooney, and *Healy*, *Q.C.*, and *O'Rorke*, for the defendants the *Nation* Newspaper Company, Limited, in support of the application.

O'Shaughnessy, *Q.C.*, and *Cusack*, for the plaintiff.

The arguments are fully given in the report in the Court of Appeal.

Cur. adv. vult.

May 16.

SIR P. O'BRIEN, L.C.J.:—

This case involves the determination of a very important question of practice. The question is this:—Can the plaintiff in an action for libel, where the innuendo which he imputes to the libel has been negatived by the jury, fall back upon the alleged defamatory matter and successfully insist that, though the jury have rejected the meaning he ascribes to the alleged libel, he is entitled to recover if the impugned matter is defamatory in a sense different from that imputed to it? This is the net question, and it arises in this way. The plaintiff, Mr. Fisher, sought to be elected as poor law guardian for one of the three vacant seats for the West ward of the Newry Urban District. He was a candidate for that position, and in reference to his candidature the Rev. Mr. Rooney published what has been described as a "manifesto," in which it was alleged he imputed to Mr. Fisher intolerance, prejudice, and bigotry. This so-called "manifesto" being published in the *Nation* newspaper, Mr. Fisher instituted an action for libel against that newspaper and the Rev. Mr. Rooney. The alleged defamatory matter—that is to say the "manifesto," or certain passages from it—was set out in the statement of claim. There was no count or paragraph without an innuendo. Various innuendoes were laid in the pleading, all of them of a very drastic character, imputing as a meaning to the manifesto, that the plaintiff had acted unjustly, and from bigoted and intolerant motives, to the prejudice of Catholics, and of his own workmen, and that he was thereby unfitted for public office and position. The innuendoes imputed also that the defendants

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intended to convey by the manifesto that the plaintiff sought to be elected as poor law guardian by corrupt and illegal practices and bribery. The case came on to be tried before my brother Gibson, and a jury of the county of Down, and the jury negatived all the innuendoes, but found that, independent of those innuendoes, the impugned matter, that is, the so-called manifesto, was libellous, and they assessed the damages at £50.

Serjeant Dodd for the defendants, insisted that, upon the findings of the jury, the verdict should be entered for the defendants—that the innuendoes (which he insisted were an essential part of the plaintiff's case) were negatived—and that there being no count or paragraph without an innuendo, the verdict should be entered for him.

The English practice was appealed to where, undoubtedly, a plaintiff, when the innuendo is negatived, is allowed to fall back upon the impugned matter and is permitted to recover if that matter is, *per se*, in the opinion of the jury, defamatory. Should that practice be followed in this country? This is the net question which presents itself for our determination. Now, before the passing of the Judicature Act, most unquestionably, the settled practice—as stereotyped as any practice could be—was that if the jury negatived the innuendo, *i. e.*, if they found that the alleged libel did not bear the defamatory meaning alleged, and if there was no count or paragraph without an innuendo, the plaintiff's action failed, and a verdict was entered for the defendant. For this reason the pleader almost invariably added a count without an innuendo. The innuendo, when laid, was treated as an essential part of the plaintiff's cause of action; and, of course, the traverse of an essential part of a cause of complaint was a good traverse; it operated as a denial of the existence of that which was essential to the cause of action. The traverse of mere superfluous matter was a bad plea in bar, and it was by reason of the innuendo being considered, when laid, an essential averment, that its denial or traverse was considered to be a good plea in bar. Thus, also, a defence to a count with an innuendo was always treated as bad if it purported to justify merely the language used, and left the innuendo uncovered. This was as well settled as any proposition of law could be; and indeed it did not at all require the authority

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of *Hort* v. *Reade* (1) to establish it. That case, however, is explicit on the subject. There a justification was held bad because it purported to deal with the alleged libel exclusive of the innuendo; and that, too, in a case in which the impugned matter was in itself, independently of the innuendo, clearly libellous. There, as in this case, the English practice was appealed to, but Mr. Justice O'Brien clearly pointed out that the language of the Common Law Procedure Acts in England and in Ireland were different—that, in effect, the peculiar language of the English Common Law Procedure Act justified a sort of hybrid or double count, but that by reason of the absence of this language from the Common Law Procedure Act in this country the English system was here inapplicable. Indeed the origin of this sort of hybrid count is dealt with by Lord Blackburn in the case of *Watkin* v. *Hall* (2), where he appears to me to ascribe its justification to the peculiar phraseology of the English Common Law Procedure Act. This being the state of things prior to the passing of the Judicature Act, the question arises, did that Act make any change? The case of *Godfrey* v. *Walsh* (3) decided that it did not. The decision in that case was unanimously arrived at by the Exchequer Division in the year 1885, several years after the Judicature Act had passed. The Court must have had the very point present to their minds. In fact, this case was a re-affirmance after the passing of the Judicature Act of the doctrine laid down in *Hort* v. *Reade* (1) which was decided before that Act was passed. It is said that the Irish Common Law Procedure Act has since been repealed, but that Act could in no way affect the question. It merely provided that prefatory averments were not necessary. We must here follow the decision of the Exchequer Division; and if its correctness is to be challenged, this must be done elsewhere. The Court of Appeal may see its way to render the practice of both countries uniform; but the case of *Godfrey* v. *Walsh* (3) is an authority binding upon us.

The decision of this pleading point is sufficient to determine the case.

(1) I. R. 7. C. L. 556. (2) L. R. 3 Q. B. 396.
(3) Unreported, Q. B. D. (Ir.) 1885.

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With reference to what was said about amendment, and as to dealing with the impugned matter independently of the innuendoes, a regard for the interests of his clients, and his own professional skill, required that Serjeant Dodd should, as he did, hold the plaintiff to the case made in the pleading, and that he should not himself give any indication of a malleable disposition but maintain an attitude as rigid as he asserted the rule of pleading to be.

Verdict and judgment must be entered for the defendants, with costs.

JOHNSON, J.:—

In this action against the *Nation* Newspaper Company, Limited, and the Rev. John Rooney, the plaintiff complains that he was libelled in a circular or manifesto addressed and published by the defendants to "The Catholic Electors of Newry," in reference to the pending election of a County Councillor for Newry. The statement of claim set out the circular, and by innuendoes imputed meanings to particular passages in it. The paragraphs of the defences, amongst other things, denied that the words complained of were a libel and traversed the innuendoes.

The defendants, as I understand, contend that their denial that the publication was a libel puts in issue whether or not it was a libel in the meanings imputed by the innuendoes, and Serjeant Dodd, for the defendants, therefore objected to the first question being left to the jury, viz. "Were the publications complained of, or some or which of them, libels?" The jury answered the question, "Yes, one of the statements in the manifesto, viz. the two paragraphs respecting the candidature of Mr. M'Loughlin." To these paragraphs the plaintiff had imputed a meaning by innuendo.

The second question left to the jury was, Do the words bear the defamatory meaning imputed by the pleadings, or some or which of them? To this the jury answered, "The jury considers the innuendoes all too strongly worded." That is in effect answering the second question in the negative and giving their reason for this finding.

In this state of things, the learned Judge, following the practice in England, rejected the unproved innuendo as surplusage,

and the jury then found that this publication to which the innuendoes were affixed was a libel, and awarded damages to the plaintiff. Verdict was entered and judgment given for the plaintiff on the finding that the publication was in itself a libel. The learned Judge offered the plaintiff leave to amend by inserting in his statement of claim a separate paragraph setting out the libel without innuendo, to which Serjeant Dodd would have pleaded a justification; and the plaintiff declined to avail himself of the offer of the learned Judge. As the pleadings stood, the defendant could only have justified the defamatory words in the sense attributed to them thereby, as was pointed out by O'Brien, J., in *Hort* v. *Reade* (1). The question for decision, therefore, is whether the practice in England in this respect is the practice in Ireland. For very many years, at all events, it has been the practice in Ireland, in an action of defamation, either oral or in writing or printed, that if the plaintiff by innuendo imputes a particular meaning to words, in themselves actionable without innuendo, and fails to prove the innuendo, the defendant is entitled to a verdict. The reason is explained by Bushe, C.J., in *Black* v. *Holmes* (2) (1822): "If the plaintiff alleges that certain words were applied to him in a certain meaning, it is the same thing as if he had stated that the defendant spoke the words in the innuendo; and when the jury find the defendant did not speak them in that sense, it is the same thing as if they found he did not speak any words at all; and if one were to look at the consequences of such a decision, they appear to be only this, that a plaintiff shall not be at liberty to take his adversary by surprise by imputing one meaning to words by his declaration, according to which the defendant prepares his defence: and then at the trial insisting upon a distinct meaning altogether, and supporting his argument by an attack upon his own pleading."

In that case the same course was taken at the trial as was taken in the present case, and the Court set aside the verdict and judgment for the plaintiff and entered it for the defendant; and this agrees with the note in Patteson & Williams' Edition of Wms. Saunders (1845) (3): "If a good innuendo, ascribing a

(1) I. R. 7 C. L. p. 556. (2) Fox & Smith, p. 40.
(3) 1 Wms. Saund. 5th Ed. p. 243.

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particular meaning to the libel or slander, be not supported in evidence, the plaintiff cannot reject it at the trial, and resort to another meaning, even in a case where the words are actionable in themselves without an innuendo, because such an innuendo gives a specific character to the libel or slander, which becomes parcel of the issue, and a failure in proof of which will be fatal to the plaintiff's case.

In *M'Manus* v. *M'Enroe* (1), Monahan, C.J., at page 339, cites *Black* v. *Holmes* (2) as establishing clearly that whether defamatory *per se* or only by means of innuendo, the plaintiff will fail on the general issue unless the jury be of opinion that the words were used in the meaning alleged in the declaration. In *Watkin* v. *Hall* (3), Blackburn, J., points out that the English Common Law Procedure Act, 1852, sect. 61, after abolishing inducement in actions of defamation to support innuendo by enacting (*a*) that it shall be sufficient to aver that the words were used in a defamatory sense, specifying it, proceeds : (*b*) "And such averment shall be put in issue by the denial of the alleged libel or slander; and where the words set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient"; and he explains that this means that a single count in libel or slander with an innuendo shall be taken as two counts, one with and the other without the innuendo; and if the plaintiff prove either it is sufficient. This enactment, as the same learned Judge points out in *Capital & Counties Bank* v. *Henty* (4), was intended only to alter the form of pleading and not the substance of proof. In Ireland, although the Common Law Procedure Act, 1853, is almost entirely copied from the English Act of 1852, the corresponding section (section 65) in the Irish Act wholly omits the second member of section 61 of the English Act which I have mentioned, and for the reason (as I apprehend) that the practice on this point had been and was different in England and Ireland; and, consequently, after the Common Law Procedure Act, 1853, was passed, the established practice continued: *Maguire* v. *Knox* (5), *Hort* v. *Reade* (6). In both these cases the difference between the

(1) 1 Ir. C. L. R. 332.
(2) Fox & Smith, p. 40.
(3) L. R. 3 Q. B. p. 402.
(4) 7 App. Cas. pp. 776, 782.
(5) I. R. 5 C. L. 408.
(6) I. R. 7 C. L. 551.

practice in England and in Ireland is referred to, and *Barrett* v. *Long* (1) was cited, but in that case the difference in the English and Irish practice was not brought to the notice of the Judges or of the House of Lords. These sections are now repealed by the Revision Acts of 1883 and 1893, but the respective practice in England and in Ireland has continued under Order XIX. regulating pleadings, as appears by the very recent case of *Godfrey* v. *Walsh* (2), of which the records were produced by Serjeant Dodd.

If what I take to be the established practice is henceforth to be changed, this, I think, ought to effected by a short additional rule to the Pleadings Order or by the Court of Appeal.

For these reasons I think the verdict and judgment should be entered for the defendants.

KENNY, J.:—

It is somewhat singular in this case that while the eminent pleaders who drafted the statement of claim apparently deemed it unsafe to launch their pleading without a series of innuendoes—seven in number—which left no portion of it uncovered, the jury have not found in the plaintiff's favour on a single one of them. They say they are "too strongly worded," and that finding must be taken as one in the defendants' favour. On the defence of "no libel" the jury have found that one sentence represented by some six lines of printed matter out of this somewhat long manifesto is a libel. To my mind it is impossible to explain this latter finding, for if the sentence culled out by the jury has any defamatory meaning, I cannot conceive what it could be except that attributed to it by the plaintiff, but which the jury have negatived. In that state of facts the defendants say that the finding by the jury that this sentence was a libel is an immaterial one, and that the question of "libel" or "no libel" should not have been submitted to them by the learned Judge.

The matter becomes of importance, having regard to the course of the trial. As I said there was no paragraph of the statement of claim that relied on the alleged defamatory matter, without the

(1) 3 H. L. Cas. 395. (2) [1885] Unreported.

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addition of an innuendo. The learned Judge, before charging the jury, suggested that the innuendoes were only a source of embarrassment, and that any question on them should be omitted. Plaintiff's counsel assented. Defendants' counsel refused to adopt such a course, and, at the Bar, tells us that he did so deliberately on the ground, which as I understand he then and there put forward, that if the case were to be tried on the words of the "manifesto" without the addition of an innuendo, he was prepared to plead justification and to examine a number of additional witnesses. At this period of the trial counsel had concluded their addresses to the jury on the evidence, and the Judge was about to charge, and in consequence of the objection of defendants' counsel the question of the innuendoes was allowed to go to the jury. If the learned Judge was correct in the view he held, that innuendoes are severable from the libel, and that a count with an innuendo should be taken as if there were two counts, one with an innuendo and the other without an innuendo, then the verdict has been rightly entered, and it was the defendants' omission not to have pleaded to the supposed count without the innuendo. If, on the other hand, his view be not correct on this point, the matter is not one involving a mere technicality, but one of grave moment to the defendants. He acted—as he says in his report—on what he conceived to be the practice adopted by the Judges in Ireland for many years, including himself, and such a statement coming from a Judge of his great experience at *nisi prius* must be treated as one of considerable weight. There seems to be no doubt that the practice he states exists in England. It apparently found its origin in the 61st section of the English Common Law Procedure Act, 1852, and in the case already referred to, of *Watkin* v. *Hall* (1); and it has continued to be the practice notwithstanding the repeal of the Common Law Procedure Act. But, in Ireland, we had no section of the Irish Common Law Procedure Act corresponding in its entirety with the English 61st section, and therefore, no ground for any change in the practice or method of pleading that existed before 1853, and which has apparently been regarded by the Courts as unaltered. In *M'Manus* v. *M'Enroe* (2),

(1) L. R. 3 Q. B. 396. (2) 1 Ir. C. L. R. 339.

decided, in 1851, before the Irish Common Law Procedure Act, Monahan, C. J., says: "*Smith* v. *Carey* (1) and *Black* v. *Holmes* (2), clearly establish that if a plaintiff by his innuendo attributes a particular meaning to the words used, he is bound by the meaning so assigned; and, whether slanderous *per se*, or only by means of an innuendo, that the plaintiff will fail on the general issue, unless the jury be of opinion that the words were used in the meaning alleged in the declaration." Such being the practice before the Common Law Procedure Act, *Maguire* v. *Knox* (3), *Hort* v. *Reade* (4) and *Godfrey* v. *Walsh* (5), are distinct authorities that the rule laid down in England, in *Watkin* v. *Hall* (6), did not and does not apply in this country. The first of these cases was not unlike the present one. The jury negatived the innuendoes while finding that the matter complained of was a libel, yet the verdict for the defendant was allowed to stand. I therefore think that the Irish practice as stated in these cases remains unaltered, and that the finding by the jury, that the matter complained of, or portion of it, was a libel, was an immaterial one under the circumstances, and that judgment should be entered for the defendants.

A. E. R. J.

The plaintiff appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker and Holmes, L.JJ.).

Campbell, Q.C. and *O'Shaughnessy Q.C.* (with them *Cusack*), for the appellant:—

Before the Common Law Procedure Act, 1853, the words complained of would have been actionable without an innuendo: *Wakley* v. *Healy* (7); *Barrett* v. *Long* (8). Odger on Libel and Slander (p. 106), states the English practice under which we would be entitled to maintain our verdict. *Hort* v. *Reade* (4)

(1) 3 Camp. 461.
(2) Fox & Sm. 28.
(3) I. R. 5 C. L. 408.
(4) I. R. 7 C. L. 551.
(5) [1885] Unreported.
(6) L. R. 3 Q. B. 396.
(7) 7 C. B. 591.
(8) 3 H. L. Cas. 395.

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was decided on the ground that words inserted in section 61 of the English Act 1852, were omitted from section 65 of the Irish Act of 1853. But the decisions above cited were not before the Court. These decisions show that the English Act was merely declaratory of the law previously laid down by the House of Lords. In any event the Common Law Procedure Act of 1853 is repealed by the Statute Law Revision Act, 1893. Besides, in *Hort* v. *Reade* (1), the words required the innuendo to give them the defamatory meaning; but that is not so here, and the defendants have pleaded "no libel." The practice in trying such cases is to disregard the innuendoes and try the case on the words alone. This is not like a case where the words are not actionable *per se*: *Ruell* v. *Tatnell* (2), *Capital and Counties Bank* v. *Henty* (3). The first issue left to the jury was on the defendants' own defence, "no libel."

[They also cited *Corbet* v. *Hill* (4); *Maguire* v. *Knox* (5).]

Serjeant Dodd (with him *Williamson*) for the defendant, the Rev. J. Rooney, and *Healy, Q.C.* (with him *O'Rorke*), for the *Nation* Newspaper Company, Limited:—

The words complained of are capable of no defamatory meaning except that which the jury have negatived. In England before the Common Law Procedure Act of 1852, when the innuendo pleaded was negatived it was not open to the plaintiff to fall back on a defamatory meaning not averred: *Williamson* v. *Stott* (6); *Sellers* v. *Till* (7); *Smith* v. *Carey* (8); *Woolnoth* v. *Meadows* (9). The change made in England by the Common Law Procedure Act of 1852 was not made in this country by the Common Law Procedure Act of 1853. *Barrett* v. *Long* (10), is distinguishable from this case, because there one good innuendo survived, but it

(1) I. R. 7 C. L. 551.
(2) 29 W. R. 172.
(3) 7 App. Cas. 741.
(4) Cro. Eliz. 609.
(5) I. R. 5 C. L. 408.
(6) 1 Cr. & Mee. at p. 687.
(7) 4 B. & C. 655.
(8) 3 Campb. 461.
(9) 5 East, 463.
(10) 7 Ir. L.R. 439; 8 Ir. L. R. 331; 3 H. L. Cas. 395.

demonstrates that where only one innuendo is possible and that innuendo is negatived, the words cannot be held to be a libel (1); *Black* v. *Holmes* (2); *Watkin* v. *Hall* (3); *M'Manus* v. *M'Enroe* (4). *Maguire* v. *Knox* (5), is on all fours with the present case: *Cosgrave* v. *Trade Auxiliary Company* (6). This Court is not bound by the decision in *Godfrey* v. *Walsh* (7), but in *Cornwall* v. *O'Brien* (8), this Court acted upon the same rule.

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O'Shaughnessy, Q.C., in reply, cited *Nixon* v. *Harvey* (9) and *Nevill* v. *Fine Arts and General Insurance Co.* (10).

Cur. adv. vult.

June 25.

The judgment of the Court was delivered by—

HOLMES, L.J.:—

There was a period in legal history when the fate of litigation often depended upon questions similar to that discussed in this case. The system under which such questions were possible was for generations the glory of the special pleader and the despair of the law reformer. In the contest between them the former long held his own. Driven by successive statutes passed for the amendment of procedure, from position after position, he was always able to entrench himself in another hardly less formidable. At length a determined frontal attack all along the line proved more successful; and since the Judicature Acts with the Rules thereunder swept away altogether the old methods, and substituted for them a system, at once simple and sensible, an argument such as has been addressed to the Court in this case is rarely heard. Still it occasionally reappears to remind us of an earlier time, "ere human statute purg'd the gentle weal." Before referring to the pleadings and the course of the trial, I am led in consequence of the observations made respecting the jury by the leading counsel for the defendants to say a few words about the action in its general aspect. The plaintiff is a shipowner and merchant

(1) See 3 H. L. C. at p. 413.
(2) 1 Fox & Smith, 28.
(3) L. R. 3 Q. B. 396.
(4) 1 Ir. C. L. R. 332.
(5) I. R. 5 C. L. 408.
(6) I. R. 8 C. L. 349.
(7) Unreported.
(8) Unreported, 11th May, 1885.
(9) 8 Ir. C. L. R. 446.
(10) [1897] A. C. 68.

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who has held several important positions both public and private in the town of Newry; and in January, 1899, he was a candidate for the office of Poor Law Guardian for the West Ward of the Newry Urban District. There is nothing in the evidence to show that either in public or private life he had allowed himself to be influenced by a sectarian or intolerant spirit or that by word or act he had shown himself a religious bigot. A short time before the election there was circulated in the constituency a document which in England or Scotland would be considered unique, and for which even in Ireland, where robuster methods of electioneering prevail, it would be difficult to find a precedent. It begins with the words, "don't vote for Mr. Joseph Fisher, because this gentleman has been as intolerant and exclusive at the Workhouse Board, as Mr. John Quinn Henry." I pass over some of the following paragraphs which, although very violently worded, might be regarded as more an attack upon the former Board as a whole than upon the plaintiff individually; and I come to this passage, "Take the treatment recently meted out to Mr. Connolly, Veterinary Surgeon, by the bigotry of the Newry Guardians. Mr. M'Loughlin applied with qualification far superior to any other for the last vacant mastership. He was rejected, not because he was disloyal or a politician, but because he was a Catholic. Mr. Fisher—the man who looks for your votes now—those votes he and his party tried to cheat you of—voted against Mr. M'Loughlin. Vote against Mr. Fisher, as a protest against his own bigotry as well as that of the old Newry Guardians. Mr. Fisher is enriched by the toil of Catholic workingmen. He wishes them to vote for him, that he may use his influence as a public man to keep his feet on the necks of Catholics and crush them down. . . . Men and women of Newry, who have votes, are you going to sell your conscientious and religious convictions by voting for a man who, if he had the power, would trample your religion and you who belong to it in the dust. Don't sell your conscience and your honour for any filthy consideration or the hope of any passing little gain." The plaintiff says that this publication for which the defendants are admitted to be responsible, did him harm; and accordingly he brought the present action. Now it is almost impossible to believe that if

the case was to be tried by a jury of fair minded and impartial men, they could have avoided finding for the plaintiff and awarding him at least moderate damages, especially when it appeared that he had nothing to do with the appointment to the vacant mastership, and was not even a member of the Board at the time.

However tolerant juries may be of strong language used in the heat of a political struggle, there is a point beyond which such language ought not to go; and so far from there being any reason to think that the jurors in this case were prejudiced against the defendant, it will be seen, when I refer to their findings, that they did their duty with great caution and moderation. I am, therefore, bound to say that the censure that has been directed against them is entirely without warrant. Holmes, L.J.

The statement of claim, as amended after defence, sets forth the above document broken up into separate portions, to most of which the pleader has attached by way of innuendo a particular meaning. It also contained another cause of action upon which the defendants obtained judgment, and to which it is unnecessary to refer. The defendants severed in their defences, and each of them pleaded that the words complained of are not a libel, that they do not bear or convey the alleged meaning, and that they are a fair comment on a matter of public interest. There are some verbal differences in the way in which each defendant states his defence; but there can be no doubt that if the language is to bear its only possible construction, the first and third defences are applied to the natural meaning of the words, not to the artificial meaning attached to them by the plaintiff's pleading.

The same observation may be made regarding an additional defence of privilege founded on interest and duty relied on by the Rev. Mr. Rooney, alone. Issue having been joined in the usual form, the action went to trial, and at the close of the plaintiff's as also of the defendants' case, Serjeant Dodd asked for a direction on the ground that the occasion was privileged and that the innuendoes were not proved.

The Judge having refused to accede to this requisition, put to the jury the following questions—1. Were the publications complained of, or some of them, libels? 2. Did they bear the

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defamatory meanings imputed by the pleadings or some and which of them; 3. Was what was complained of honest fair comment on matters of public interest and; 5. Did the defendants act maliciously? The jury said in answer to the first question "Yes, one of the statements in the manifesto, viz. the two paragraphs respecting the candidature of M'Loughlin" and to the second, "the jury considers the innuendoes all too strongly worded." They also answered the third question in the negative, and the fourth in the affirmative, and assessed damages at £50. It is perfectly clear that the Judge conveyed to the jury, and that the jury thoroughly understood that the first, third and fourth questions related to the words in the sense which the jury thought they ought to bear. He says that he at first suggested that the innuendoes only tended to embarrass the jury, and that the question referring to them might be struck out; but on Serjeant Dodd objecting, he left it with the others.

Serjeant Dodd's point, urged then and now, is that the plaintiff was bound to prove the innuendoes, and that having failed to do so, it became immaterial whether the publication as a whole or any part of it was a libel. The Judge, however, thought differently, and gave judgment for the plaintiff for £50, with costs as to the portion of the document specified by the jury, giving at the same time judgment for the defendants, with costs as to the residue of the action.

The question in this appeal is whether he was right. Now it is to be noted that what was tried were the issues raised by the defendants themselves, that these issues were tried fully and exhaustively, and that if the defendants had notice when the statement of claim was delivered of the course that would be taken by the Judge at the trial, they could not have made a better or a different case. It has been suggested that they might have pleaded justification; but if they had, it would not have affected the result, as they have got judgment on every part of the publication except on that which it is admitted they could not justify. Besides, in a case of this kind, the defendants have, under the defence of fair comment, all the advantages both as regards admission of evidence and consideration by the jury which they would have under a defence of justification.

It is further to be observed that the course taken by Mr. Justice Gibson would admittedly have been the proper and legal course in England, and that it is not unusual in this country. I have it from Mr. Justice Gibson himself, that during his twelve years of judicial experience he has always acted without objection on the view that the innuendoes are severable from the libel. I have acted on the same view during the ten years in which I was engaged in trying jury cases; and I think I could name other Judges who have done so. Therefore, there has been a trial in which every possible issue was raised and determined, and which was conducted in a manner that has received the approbation of all the English and some Irish Judges, with the result of establishing that the plaintiff had a good cause of action, entitling him to recover £50 as damages. Is the law regulating legal procedure, after all our reforms still so imperfect, as to oblige a Court of Justice under such circumstances not merely to refuse the plaintiff the damages awarded him, but also to give a judgment against him for the costs incurred by his adversary in resisting his righteous claim? Mr. Justice Gibson says in his report that as there was no surprise, an amendment could be made, but that no amendment was asked for, nor did he think it necessary. This Court also thinks that it was not necessary, but if it were, I wish to say for myself, that I am of opinion that we ought now to either make it, or to deal with the case as if it had been made. An amendment by the terms of the Rule may be allowed at any stage of the case; and I think it may be reasonably made after trial by either the Divisional Court, or by the Court of Appeal, for the purpose of bringing the pleadings into conformity with the issues actually tried by the Judge and jury, when both parties were prepared for, and neither taken by surprise, at such trial. "Now, I think, it is a well established principle," said Bowen, L. J., in *Cropper* v. *Smith* (1), "that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other Division of the Court of Appeal,

(1) 24 Ch. D. 305.

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and by myself as a member of it, I know of no error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct if it can be done without injustice to the other party."

Although in that case the majority of the Court declined on special grounds to make the amendment needed, I have never heard the soundness of the observations of Lord Justice Bowen doubted. I am glad, however, to say that in this case it is not necessary to amend; and my reasons for this conclusion can be stated with brevity.

I do not propose to discuss the authorities, beginning with Croke, Elizabeth, that have been quoted in the argument. I am satisfied that the English Judges in *Watkin* v. *Hall* (1), and the Irish Judges in *Hort* v. *Reade* (2), were perfectly familiar with the rules of pleading in their respective countries before the Common Law Procedure Acts of 1852 and 1853, respectively. I assume that these cases show that previous to those enactments the law in both England and Ireland was that the pleader was bound by his innuendo, and that if it was rejected, he could not rely on any other defamatory sense which the words might bear. I also assume that by reason of a difference between the 61st section of the Act of 1852, and the 65th section of the Act of 1853, the former law was not altered in Ireland by the Irish Statute, although the English Act allowed a plaintiff who failed to sustain his innuendo to show that the language complained of bore another defamatory meaning.

In this state of things, the Judicature Acts were passed for England in 1873 and 1875, and for Ireland in 1877. These Statutes provide for the making of Rules for regulating the pleading, practice and procedure in the High Court of Justice and Court of Appeal; and the 65th section of the Irish Statute enacts that, "in making, altering or annulling Rules of Court in pursuance of this Act, regard shall be had to the Rules of Court for the time being in force under the provisions of the Supreme Court of Judicature Act, 1873 and 1875, so as that the pleading, practice and procedure in the High Court of Justice and Court of

(1) L. R. 3 Q. B. 396. (2) I. R. 7 C. L. 551.

Appeal, respectively, constituted by this Act, shall so far as may be practicable and convenient, having regard to the difference of the laws and circumstances of the two countries, be the same as the pleading, practice and procedure in the High Court of Justice and Court of Appeal, respectively, constituted by the said Acts."

It was evidently the intention that pleading, practice and procedure were to be recast by means of Rules of Court, and that the new point of departure was to be taken advantage of for the purpose of making the systems in the two countries uniform.

Accordingly Rules of Court have been made in England and Ireland which so far as pleading is concerned are identical. That the Legislature believes that the intention of the Judicature Acts had been carried out is shown by the repeal of large portions of the previous statutes regulating pleading and procedure, including the 61st section of the Act of 1852, and the 65th section of the Act of 1853, already referred to. By the rule now in force in both countries, a pleading shall only contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence. Where, in an action of libel the words complained of are *per se* innocent, it is no doubt material to set forth by way of innuendo or otherwise some fact or facts showing that as used by the defendant they bear a defamatory meaning; but where the words are in themselves capable of a defamatory sense, an innuendo is immaterial as part of the cause of action, although it may occasionally serve a useful collateral purpose, as, for example, the aggravation of damages. It seems, therefore, to me to be clear that the defendant is at liberty to defend himself by reference to the language he actually used in the sense which it will be determined by the jury it ought to bear, and not in some artificial and fanciful sense invented by the pleader. With all respect for the opinions of an earlier race of lawyers, I think that it might often lead to injustice to oblige a defendant to stake his case on whether a jury will accept the pleader's innuendo. It is but fair and reasonable that he should be permitted to show that his publication was not a libel, and to justify or excuse it in its natural sense. But whether fair and reasonable or the contrary, I am of opinion that this is now the

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law, and I have already shown that the defendants have availed themselves of it in the present action. It follows, that if this is the right of a defendant, a plaintiff may also claim to have the words complained of considered apart from the innuendo. This is the English practice, and if it is not yet definitely settled in this country, it is time that it should be.

It is said that in an unreported case—*Godfrey* v. *Walsh* (1)—the Exchequer Division held in 1885 that the old rule was still to be applied in Ireland; and the Queen's Bench Division seems to have considered itself bound thereby. I have no means of knowing the reasons for that decision. It was given, I believe, on an interlocutory motion, and I can understand that it may have rested on grounds that would not apply after judgment. But in any case it cannot relieve this Court from considering the matter for itself.

It would be a subject for regret if the defendants in this action had been placed at a disadvantage by reason of a misapprehension on the part of their counsel as to the mode of pleading. But I have shown that there is no ground for this idea, the defendants having had the benefit of every defence consistent with admitted facts.

For these reasons the Court holds that the appeal be allowed, that the judgment of Mr. Justice Gibson be restored, and that the defendants pay the costs in the Divisional Court and costs of appeal.

Solicitors for the plaintiff: *Fisher & Fisher.*
Solicitor for the *Nation* Newspaper Co., Ltd.: *Dennehy.*
Solicitor for the Rev. J. Rooney: *Hanratty.*

G. Y. D.

(1) 1885, Unreported.

ROBINSON *v.* PALMER (1).

(1900. No. 87.)

K. B. Div. Probate. 1901. Feb. 4.

Probate—Jurisdiction—English domicil—Irish assets.

The Court of Probate in Ireland has jurisdiction to grant probate of the will of a testator whose assets were in Ireland, although his domicil was English.

MOTION.

Charles de Montmorency Palmer, a domiciled Englishman, died at Buxton in England, on the 16th September, 1899. All the assets of the deceased were in Ireland. St. G. C. Robinson, who was named as one of the executors of a paper-writing or will of the deceased, dated the 16th July, 1888, applied to the Court that it might be declared that certain paper-writings constituted the last will of the deceased, and that probate thereof might be granted to him.

J. W. Hynes, in support of the application :—

[ANDREWS, J. :—When a will has been made by a testator who has died, domiciled in England, it would seem doubtful whether the Court in Ireland can properly grant probate of his will. See Tristram & Coote (Probate Practice), 414 : *Enohin* v. *Wylie* (2)].

The passage cited was only a dictum of Lord Westbury, and the other Law Lords who decided *Enohin* v. *Wylie* (2) did not agree with it. In *Ewing* v. *Orr Ewing* (3), that dictum is expressly dissented from.

The foundation of the jurisdiction of the Court of Probate is that there are assets of the deceased to be distributed within its

(1) Before ANDREWS, J. (2) 10 H. L. Cas. 13.
(3) 9 App. Cas. 34.

K. B. Div. *Probate.* 1901.

ROBINSON v. PALMER.

jurisdiction: *In the Goods of Butson* (1); *In the Goods of Deshais* (2).

ANDREWS, J., held that the Court had jurisdiction to decree probate.

Solicitor for the applicant: *Warren.*

R. W. L.

Appeal. 1900.

Nov. 12.

M'DAID *v.* GALBRAITH (3).

Parliament—Franchise—Inhabitant householder—Payment of rates—Tender of part—Union charges—Poor-rate—Local Government (Ireland) Act, 1898.

A voter on whom a demand note for "union charges" and "county at large charges," forming the rate struck in respect of the qualifying premises, tendered to the rate collector so much of the rate as was described as "union charges." The rate collector refused to accept the sum so tendered unless the voter also paid the portion representing the "county at large charges." The Revising Barrister was of opinion that the "union charges" represented "the poor-rate" mentioned in the Franchise Acts, and as the sum equivalent thereto had been tendered to the collector, he retained the voter's name on the list:—

Held (by the Court of Appeal), that the rate could not be subdivided, and that, as the entire rate had not been paid, the voter was disqualified.

Per Lord O'Brien, L.C.J.: Tender of the poor-rate refused by the collector is not sufficient to qualify for the franchise. The rate must be paid.

APPEAL by the objector from the decision of Mr. J. F. Moriarty, one of the Assistant Revising Barristers for the county borough of Londonderry, who admitted the respondent John Galbraith to the franchise. The respondent's name appeared on the Town Clerk's list, No. 17, as an inhabitant householder, and

(1) 9 L. R. Ir. 21.
(2) 4 Sw. & Tr. 13.
(3) Before LORD O'BRIEN, L.C.J., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900.

M'DAID v. GALBRAITH.

was duly objected to. The facts were thus set forth in the case stated:—

"The point involved in this case is as to the payment of the rates on the house, 39, Lower Road, being Rate No. 1468. I ascertained the following facts from examination of the clerk of the union, the rate collector, the city accountant, and the landlord of the voter (M'Gill). The local financial year begins and ends on the 31st March in each year. For the year 1899, a rate was struck for the local financial year, ending 31st March, 1900, as follows:—Union charges, 8*d.* per £, county at large charges, 1*s.* 8*d.* per £., and that rate was directed to be collected in equal moieties by resolution of the Council, dated the 11th July, 1899. In the case of the house 39, Lower Road, out of which the voter was seeking to qualify, that rate amounted to the sum of 28*s.*, and was made up as follows:—Union charges, 8*s.*; county at large charges, £1; and two demand notes were served in respect of it, on copies of which demand notes, marked respectively A and B, I have written my name, and which I annex to this case. The rate of 8*d.*, struck to defray union charges, was struck to defray the expenses of the poor law guardians in pursuance of the Local Government (Ireland) Act, 1898, in compliance with "The Annual Estimate and Demand of Board of Guardians," Form No. 23. I annex the original document served on the Council, and I have marked it C, and written my name on it, and embody it with this case. I also annex a form of receipt for rates to use in Derry marked D. I find, as a fact, that the sum of 8*s.*, payable in respect of the said house, 39, Lower Road, and specified in the demand note as union charges, represents what, in the statutes dealing with Parliamentary franchise in Ireland, was called "poor-rates," or "rates made for the relief of the poor," in respect of such premises. The first demand note was served in August, and the sum of 14*s.*, being 4*s.* for union charges and 10*s.* for county at large charges, was duly paid in August. The second demand note was served in December, 1899. The landlord of the voter, on two or three occasions before the 1st July, tendered to one of the rate collectors (Mr. Waller) in his office the sum of 4*s.*, being the union charges remaining unpaid, and made a formal tender on the 30th June in his office,

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at a convenient hour, of the said sum of 4*s.*, in the presence of witnesses. The rate collector refused the sum of 4*s.* for union charges, unless the voter also paid the sum of 10*s.* for county at large charges, and the said second moiety, 14*s.*, remained unpaid.

The question intended to be raised for the Court of Appeal is, was the voter disfranchised by reason of the non-payment of the said sum of 14*s.*? I retained his name. Was the poor-rate collector justified in refusing to accept payment of the sum representing union charges, unless the county at large charges were also tendered? Would payment of this sum of 4*s.*, representing union charges (if accepted) entitle the voter to be registered without payment of the sum representing county at large charges? Was tender of the sum, without actual payment, sufficient?

I name John Galbraith, and R. N. Chambers, town clerk, respondents."

Wylie, Q.C., and *O'Donnell*, for the appellant.

Cooke, Q.C., and *Osborne*, for the respondent.

LORD O'BRIEN, L.C.J.:—

In *Murray* v. *Leonard* (1) I said that I believed that payment of the rates was an essential condition of the franchise. I thought that if the claimant had tendered all the rates due by him to the rate collector and the rate collector had refused them, the claimant would have had a remedy against the collector by an action for damages, but that the right to the franchise could not be secured without an actual payment of the rates. What I said there was, of course, an opinion and not a decision, for it was not necessary for the Court then to decide the point. I find that in a subsequent case: *Holland* v. *Chambers*; *John Doherty's Case* (2) the Lord Chief Baron expressed his dissent from the opinion I had expressed. On consideration of the matter, I adhere to what I stated. In *Murray* v. *Leonard* (1) Lord Justice Fitz Gibbon

(1) Lawson, 157. (2) [1894] Lawson, 15.

guarded himself from being supposed to decide that an officer corruptly refusing rates properly tendered could deprive a man of his vote. But I do not think he intended to say that a tender of the rates due to the officer could supply the place of actual payment. Lord Justice Barry said that he was inclined to hold that actual payment of the rates could not be dispensed with, and that the remedy, if they were tendered and refused to be taken, would be against the officer. I remember subsequently discussing the matter with Lord Justice Barry, and he stated to me that his view was that a tender of the proper amount of rates by the occupier of the premises to the officer, if not accepted by the officer, would not qualify the occupier for the franchise, but that there must be an actual payment of the rates in order to confer the right to vote. I regret that I am unable to claim the high authority of the Lord Chief Baron in support of my opinion, but the weight of Lord Justice Barry's opinion fortifies the view which I expressed in *Murray* v. *Leonard* (1), and to which, as at present advised, I adhere.

In this case there was neither payment nor tender of the poor-rate. The rate collector cannot accept any sum but that which he is entitled to receive. He is to give a receipt in the prescribed form, *i.e.* for the amount of the rates due, and to give no other receipt for any rate whatever. The "union charges," it would appear from the decision in *Duggan's Estate* (2), do not necessarily comprise all the old poor-rate. All doubt is removed by sect. 66 of the Local Government (Ireland) Act, 1898. That section plainly shows that in the city of Dublin—where the poor-rate is to be levied in the same manner as in the rest of Ireland—if any of the items which are aggregated and levied as poor-rate is left unpaid, the person making default is disqualified for the franchise, and if it is desired to avoid this result, the item in question should be levied as a separate rate. But the powers given by the section of making separate rates are confined to the city of Dublin. It follows that in this case the entire of the items specified in the demand note and leviable as poor-rate should have been paid as a condition precedent to establishing a right to the franchise.

(1) Lawson, 157. (2) [1900] 1 I. R. 68.

Appeal. 1900. M'Daid v. Galbraith.

Fitz Gibbon, L.J. :—

The decisions upon the effect on the franchise of mistake, neglect, or misfeasance of officials, have nothing to say to this case. There are several instances in which the Courts have been reluctant to deprive men of their votes through the fault or default of officials. But such considerations are outside this case. There was no misfeasance here on the part of the collector in refusing to accept a part only of the poor-rate. He could give but one receipt, and he was under no obligation—even if he had the power—to receive less than the whole rate.

We must face the alternative: *either* the aggregate of all the items included in the consolidated sum now leviable under the name of "poor-rate" must be paid, in order to entitle a rated occupier to the franchise; *or* the condition precedent of "payment of rates" must be gone altogether, and there is no longer any rate to which the words imposing the condition can apply. The statute 31 & 32 Vict. c. 10, s. 28, directs a demand of the rate for the relief of the poor, and Mr. Cooke says that this demand is a condition precedent to disqualifying a man for its non-payment. But the officer who makes the demand cannot segregate what has been called "the old poor-rate" from the rest of the now statutory poor-rate. Why should not the demand of all that is now payable as "poor-rate" stand in the place, and involve the consequences, of the demand of the lesser sum which was formerly payable for poor-rate? The Legislature may well have thought that the enjoyment of the Local Government franchise should be given only to those who paid their local rates.

All doubt as to the intention of the framers of the Local Government Act is removed by sect. 66: it deals with the collection of rates in Dublin, and sub-sect. (1) provides that "*the poor-rate* shall be levied in the city of Dublin, in like manner as in the rest of Ireland." Sub-sects. (2) and (3) provide for the estimation of the amounts required for the maintenance of the police force, and for the purpose of the bridge tax and bridge rate. Sub-sect. (5) directs the Municipal Council to raise, "either by means of a separate rate, *or by means of the poor-rate, but as a separate item thereof*," the amounts required for the police and for the bridges. Then sub-sect. (7) provides that a Council levying

a separate rate for the purpose of this section shall make, levy, and collect the same upon the basis and in like manner *as the poor-rate*, and *all enactments relating to the poor-rate* shall apply accordingly, with the *exception* that *a person shall not be disqualified for being registered as a parliamentary or local government elector by reason of the non-payment of any such separate rate.*" Therefore, in Dublin, the amounts of the police and bridge items only, and those only when levied as a separate rate, are excluded from the disqualification which follows from the non-payment of "poor-rate," and "poor-rate" in section 66 is, by necessary implication, "the poor-rate" leviable in all Ireland, and includes all that was leviable under the former law under the name of county-cess, or was one of the items now consolidated under the name of "poor-rate." We are asked to hold that, without any provision to that effect, we are to *imply*, all over Ireland, a provision as to county-cess and all the other accretions to the poor-rate, to the same effect as sect. 66 (7), which *expressly* confines the exemption from disqualification to non-payment of a separate rate for the police and bridge expenses.

Furthermore, no part of the rate was paid here: there was a tender of something, but not even of an equivalent for "the old poor-rate." In *Duggan's Estate* (1), I pointed out that the "union charges" do not include the whole of the old poor-rate. The statement in the case that the sum specified in the demand note as "union charges" represents what in the Statute dealing with Parliamentary Franchise in Ireland was called "poor-rates," cannot be taken as a finding of fact, because it contradicts the Local Government Act, which shows that the "union charges" are necessarily less in amount than the old "poor-rate" would have been.

Again, the Act provides no means of segregating or ascertaining the old poor-rate, or of dividing what Parliament has thereby substituted for the old poor-rate, and has defined as "*the* poor-rate."

For these reasons I am clearly of opinion that a person now claiming the franchise must pay the whole sum which the Local Government Act calls "poor-rate," where payment of rates

(1) [1900] 1 I. R. 68.

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for the relief of the poor was a condition precedent to registration as a voter under the former law.

WALKER, L.J.:—

I concur. The language of the Legislature forces us to say that the tax levied as poor-rate under the Local Government Act is to be taken as the poor-rate for all purposes. The only alternative would be, that there is no longer any poor-rate which must be paid to satisfy the Registration Acts.

The sum tendered here by the claimant was not a sum which the collector had power to accept.

The legislation contained in section 66 of the Local Government Act, as to the city of Dublin, shows that elsewhere disqualification must result unless the entire poor-rate be paid.

HOLMES, L.J.:—

Even if I were satisfied that the sum offered to the rate-collector by the respondent covered all the items of which the old poor-rate was composed, I should be obliged to hold that there was no tender. A legal tender can only be made to a person entitled to receive, and it would have been a breach of duty for the rate-collector to take the money.

Therefore the respondent cannot sustain his right to be on the list of voters, unless he is able to show that there is now no rate for the relief of the poor within the meaning of the Franchise and Registration Acts, and that the provisions regarding the payment of rates therein have no longer a subject-matter to which they can apply.

But the contrary is involved in the judgment of this Court in *Duggan's Case* (1). If there were no longer a poor-rate within the meaning of the Irish Poor Law Acts, the Land Commission would have been right in their contention in that case, that the tithe payer was not entitled to make any deduction from the tithe rent-charge. It was, however, held that his right to make some deduction was undoubted, although the amount of the deduction was left open.

(1) [1900] 1 I. R. 68.

It is satisfactory to know that this conclusion from the language of the Local Government Act, is in accordance with the intention of the Legislature, inasmuch as sect. 66, sub-sect. 7, shows clearly that non-payment of the new poor-rate is a disqualification for the franchise.

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Solicitor for the appellant: *W. O'Doherty.*

Solicitor for the respondent: *Miller.*

G. Y. D.

REG. (GALLAGHER) *v.* CHAIRMAN AND JUSTICES OF CO. TYRONE (1).

Q. B. Div. 1900. Dec. 10.

Appeal. 1901. Feb. 7, 8.

Licensing law —Notice of intended application for excise licence—Service of notice — "Next resident magistrate" — Residence — 3 *&* 4 *Wm.* 4, *c.* 68, *s.* 2.

Section 2 of 3 & 4 Wm. 4, c. 68, provides for service of a notice of intention to apply for an Excise licence upon the "two next resident magistrates":

Held, by the Queen's Bench Division, on *certiorari*, that it was not a sufficient compliance with the section to serve a magistrate who had a place of business nearer to, but who dwelt—"eat, drank, and slept, with his family"—further away from the applicant's premises than other magistrates:—

Held on appeal (reversing the decision of the Queen's Bench Division), that a place of business where a magistrate ordinarily transacted his commercial business, and where he was to be found during the working hours of the day, was a residence within the meaning of the section.

CERTIORARI.

Motion to make absolute a conditional order for a writ of *certiorari* to remove and quash an order of the Justices of County Tyrone, sitting at the annual Licensing Quarter Sessions held at Strabane, on the 11th October, 1900, granting to the respondent Terence M'Donnell, the requisite certificate for obtaining an

(1) In the Queen's Bench Division before PALLES, C.B., and JOHNSON, BOYD, and KENNY, JJ.

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excise licence for the sale of beer, cider, and spirits, by retail, "at his house at Back-street, Strabane," on the ground of want and excess of jurisdiction, that there was no due compliance with the statutory requirements as to preliminary notices, and that due notice in writing of the application and of the situation and description of the said house was not given to each of the two next resident magistrates of the district within which the said house was situate.

From the affidavits filed on behalf of the prosecutor, J. Gallagher, who in the Court below had objected to the granting of the licence, it appeared that the main ground of objection taken to M'Donnell's application for a new licence, was that the "two next resident" magistrates had not been served with notice of the intended application as required by 3 & 4 Wm. 4, c. 68, sect. 2. The notice had been served on P. M'Menamin, J.P., and on Neil Bradley, J.P. According to the prosecutor's account, Bradley lived further away than several other magistrates, and especially further than Mr. Edward Gallagher, J.P., who had been served by M'Donnell at the previous licensing sessions, and the prosecutor alleged that M'Donnell's solicitor had "stated that Bradley had a public-house almost next door to the applicant in Back street, and that service on him was sufficient, though he did not reside therein." Gallagher further called attention to the notice as "exceedingly vague in form," having regard to the fact that the applicant had two houses in Back street—the one in which he resided and for which the licence was not sought, and the other which was vacant for which the licence was sought.

M'Donnell's account, in answer to the affidavit of J. Gallagher, his brother-in-law and a rival publican, was that the house in respect of which he applied for the licence, and the house in which he lived adjoined; and were two buildings newly erected by him; that since their completion he "resided" in one, and used the other in connexion with his business; that an objection was raised to the service on Bradley, "on the ground that he [Bradley] did not sleep at his place of business where he was served, which is situated in the same street, and within some 20 yards of M'Donnell's residence." "Mr. Bradley, it is true, does not sleep at this business place, but he is in constant and

regular attendance there daily, from early morning till late at night. Mr. Bradley personally transacts all his business in his said business house. He uses portion of said house as an office, and I am informed and believe that all his business correspondence, including letters, invoices, and other documents, are addressed to him by merchants and others, and delivered to him by post and otherwise at his said business place, which is his recognized address, both for making and receiving all business communications; and I say that no person in Strabane who had any legal or other document to serve personally on Mr. Bradley would go to his private dwelling-house, as he could only be found there late at night, as he stays in his business house till same is closed at 11 o'clock, p.m., and very often much later. Mr. Bradley only sleeps in his house in Bridge End street, Strabane, but notwithstanding this, he is still the next resident Justice to my place, as Mr. Edward Gallagher, J.P., mentioned in John Gallagher's affidavit, lives and sleeps, not in his place of business in Main-street, but in his dwelling-house in the townland of Ballycolman, which is fully 300 yards farther away from my said house than the dwelling-house of Mr. Bradley. And said Edward Gallagher usually leaves his said business house at a much earlier hour than Mr. Bradley, because said Edward Gallagher is a draper, and his hour for closing his shop is 7 o'clock, p.m., whereas Mr. Bradley being a publican remains till his shop closes at 11 o'clock, p.m."

In an affidavit, in reply, Gallagher stated that, even putting Mr. E. Gallagher aside, two other Justices resided unquestionably nearer to Back street than Bradley's residence in Bridge End street, and that at Quarter Sessions it was solely contended that Bradley's place of business in Back street was sufficient residence, no details being discussed or put in evidence. He further stated that the fact was that, he [Gallagher] lived "within three doors of the public-house of Mr. Bradley," which was "managed by a barman who resides in the house, and, except an occasional visit, Mr. Bradley" was "never there"; that Bradley was "a flax-buyer and merchant," that he was "most of his time in the country buying," that his "office hours were spent almost altogether in an office in the market where he had stores, and where

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he was to be found at all times of the day, and" that he was "much more frequently and longer in the office in the market than in the public-house in Back-street." Gallagher's solicitor (Mr. J. E. O'Doherty) stated that the matter was discussed at Quarter Sessions, upon the assumption that, to the knowledge of all concerned, if Back street did not make Mr. Bradley "next resident," [then] only one of the next resident Justices had been served.

M'Donnell's solicitor, in reply to this, stated that the flax markets were held only on Wednesdays, and only occupied about two hours, and that the stipendiary magistrate (even if the section applied to him) lodged in the hotel, and (as deponent was informed and believed) was then absent on his holidays.

Wylie, Q.C., and *Patchell*, for the objector below.

Drummond, Q.C., and *Gallagher*, for M'Donnell.

[Counsel cited *Reg.* (*Gilbey*) v. *Justices Fermanagh* (1), *Reg.* (*Kinsella*) v. *Justices of Wicklow* (2)].

PALLES, C.B. :—

Whether Mr. Bradley, one of the two magistrates upon whom the notice was served, was one of the two *next* resident magistrates within the meaning of 3 & 4 Wm. 4, c. 68, sect. 2, depends upon the place which is his residence. If he resides in his place of business in Back street, then he was one of the "two *next* resident magistrates," and the Justices had jurisdiction. On the other hand, if his residence is not in his place of business in Back street, but in his house in Bridge End street, then there were other magistrates who resided nearer to the place sought to be licensed; and, as in that event, one of the persons directed by the section to be served with the notice was not so served, the Justices would not have had jurisdiction, and their order ought to be quashed.

From the affidavits I gather that Mr. Bradley sleeps in his house in Bridge End street, and has his meals there whenever

(1) [1897] 2 I. R. 563. (2) I. R. 11 C. L. 59.

his presence is not required for business purposes in his place of business or elsewhere. His presence possibly may be so required in his place of business during a large portion of the time when public-houses are permitted to be open (although this is not clear), and, I suppose, that when he is there he takes some of his meals there. His family and servants sleep and eat in Bridge End street.

There is nothing in the section to show that "resident" in it was used in a more extended sense than its ordinary one, and therefore we must apply the definition given by Bayley, J., in *Rex* v. *Inhabitants of North Curry*(1), "the place where an individual eats, drinks, and sleeps, *or* where his family *or* servants eat, drink, and sleep."

I am therefore of opinion that his house in Bridge End street is his residence: so the order must be quashed.

JOHNSON, J.:—

If the second affidavit on behalf of the prosecutor had not been put in, I should have been inclined to decide that the public-house was Bradley's residence, having regard to the scope and meaning of the Act, as, according to the affidavit on behalf of the applicant below (M'Donnell), it was alleged that Mr. Bradley was in his public-house daily, from 8 a.m. to 11 p.m., and that he only slept in his other house. But the second affidavit puts a different complexion on the facts of the case; and we are driven back to the primary meaning of the word "residence." The material part of the second affidavit is the statement that Bradley's business takes him frequently to the country, and that he is therefore only an occasional visitor at the public-house; and, as this material allegation is not answered, I think we are driven back to the meaning of "residence," as the place where his home is, and where he eats and sleeps. The decision of the magistrates was therefore wrong.

BOYD and KENNY, JJ., concurred.

A. E. R. J.

(1) 4 B. & C. 959.

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Feb. 7, 8.

M'Donnell appealed to the Court of Appeal (1).

Drummond, K.C., and *Law Smith*, for the appellant:—

We submit that the nearest resident magistrate was Bradley: in such cases residence implies personal presence during some portion of the day. A place of business may be a residence, and has been held to be so under several statutes. Under the Bankruptcy Act of 1869 a place of business was held to be a residence for serving a debtor summons: *Ex parte Breull* (2). Similar decisions have been pronounced under the Bills of Sale Act: *Blackwell* v. *England* (3); *Hewer* v. *Cox* (4); and *Attenborough* v. *Thompson* (5). *D'Arcy* v. *Hastings* (6) is a similar decision upon sect. 97 of the Common Law Procedure Act of 1856. A person may have more than one residence: *Walcot* v. *Botfield* (7). The only remedy for insufficiency of notice is to refuse the license, and, provided the proceeding is *bona fide*, the Justices must have some discretion: *Reg.* v. *Justices of Over Darwen* (8).

Wylie, K.C., and *Patchell* for the respondent:—

Residence means the place where a man eats and sleeps—his dwelling. Under the existing Rules under the Judicature Act, it has been held that residence means a dwelling, and a place of business will not suffice: *Stoy* v. *Rees* (9).

Feb. 8.

FITZ GIBBON, L.J.:—

The question on this appeal has arisen on the construction of many Acts of Parliament, but the decision depends on the meaning of "resident" in one Act only. The question of law, which alone we can consider on *certiorari*, is—Whether under 3 & 4 Wm. 4, c. 68, sect. 2, a man can have two residences? The magistrate, Mr. Bradley, to whom the notice was given, certainly had a private residence which was not "next" to the applicant's house.

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.
(2) 16 Ch. D. 484.
(3) 8 E. & B. 541.
(4) 3 E. & E. 428.
(5) 2 H. & N. 559.
(6) 10 Ir. C. L. R. App. xxiv.
(7) Kay, 534.
(8) 39 L. T. R. 444.
(9) 24 Q. B. D. 748.

The contention before the magistrates was that he did not "reside" in the house in which he carried on his business as a publican, and they held that he did, although he had a dwelling-house elsewhere. This being decided, it followed that the service was sufficient, because, being "resident" in that place, he was one of "the two next resident magistrates" to the house for which the application was made.

The Queen's Bench held that, for the purposes of this Act, a magistrate could have but one residence—could be "resident" in one place only—namely, where he "dwelt." But we have to see whether, on the construction and for the purposes of this Act, a man is not "resident" where he transacts all his affairs, and where he is personally to be found when wanted on business, whether he sleeps there or not. The Act provides that, as a condition precedent to getting a license, the applicant shall give the prescribed notice "to each of the two next resident magistrates." If the word "resident" could be read by itself, it might mean living in the town, as distinguished from absentee; or it might mean stipendiary and professional, as distinguished from ordinary and unpaid: but if so, an applicant might hand the notice to whatever two magistrates of the defined class happened to be next him, or to first pass his door, when he had it ready. That cannot be the meaning; "resident" must be qualified by "next." The expression must mean the two magistrates who reside—*i. e.* have a residence—nearest to the house for which the license is desired. Thus we have only to see whether the meaning of the word "residence" in this Act excludes the place where a man personally and daily transacts his business, and is usually found, and whether this Act intends that a man must "reside" where he sleeps, and nowhere else. In ordinary life many people have two residences. I myself should find it hard to say that either of two houses is more my residence than the other. Counted by time, by work, by the chance of finding him when wanted, by any sensible test, many a man is "resident" where he spends his waking hours; some may even have no settled sleeping-place, though constantly to be found in the same place of business day by day.

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The word "resident" occurs again at the end of the section, with a context which excludes the narrower sense: the Clerk of the Peace is directed to transmit a copy of the list of applicants "to every magistrate *resident*" within the city or town. Surely it would be against the intention, and it would defeat the object, of the Act to hold that the list was to be sent only to those magistrates who had beds in the city or town, and that all those who came in daily from their homes in the suburbs to the places of business in which they spent all the active portions of their lives, where all their other business was done, where they were best known, where their letters were addressed, and where they were most constantly to be found, were to be left out as *non-resident*. Thus, on the face of this very Act and section, notice must be given to magistrates as "*resident*," who are so through frequenting the places where they carry on their business. "The *two next*" of these "residents" are to be served by the applicant: *all* are to be noticed by the Clerk of the Peace. Accordingly, on the question of law, I hold that a business residence is within the Act, and that a man may have such a residence, though he has a private residence besides.

In my opinion, in this Act, "resident" is contrasted with non-resident, or absentee. There are plenty of absentee magistrates to account for the legislation. The commission of the peace in every county includes a number of magistrates who do not reside there in any sense—non-resident owners of property, former residents, officials, King's Counsel, and others only casually connected with the county. Many hold the Commission in several counties. The object of the statute was that notice should be given to the magistrates who were on the spot, likely to be acquainted with the applicant, and knowing the locality. The business men of the town who are there every day, and all day long, satisfy this condition quite as effectually as those who only sleep there.

The decisions on other Acts of Parliament, both those in which special meanings have been given to the word "residence," and those where it has been held to be satisfied by a place of business, should be considered. The decisions upon the Common

Law Procedure Acts, are very important. The Act of 1853, sect. 9, provides:—

> "In every writ . . . the place of residence of the plaintiff, and the place of residence, or supposed residence, or last known residence of the defendant, shall be mentioned."

That Act did not refer to Civil Bill jurisdiction, which was first mentioned in the Act of 1856. But upon the Act of 1856, sect. 97, the Courts had to determine the meaning of the words "when the parties reside within the same Civil Bill jurisdiction." These words had to be construed consistently with the Civil Bill Act, 1851, sect. 69, which defined the Civil Bill jurisdiction, and declared a house occupied "for carrying on any business" to be a residence within the meaning of that Act. Thus "residence" in the Act of 1853 was necessarily held to have, and therefore from 1853 to have had, the same meaning as "reside" in the Acts of 1851 and 1856. Accordingly *D'Arcy* v. *Hastings* (1) and *Moffat* v. *M'Ternan* (2) established that the place of business of a man who dwelt elsewhere was a residence within the meaning of the Common Law Procedure Acts, and that a man *may* be resident where he works. The only case apparently to the opposite effect is *Wright* v. *Brown* (3). But that case, which is a decision of George, J. unsatisfactorily reported, may perhaps be upheld on the ground that the defendant moved too soon, or unnecessarily. The plaintiff sued on a bill of exchange, and the writ gave his place of business, which was in Dublin, as his residence. The defendant moved to set aside the summons and plaint, or to amend it by inserting the plaintiff's dwelling-house as his residence, which was in the same Civil Bill jurisdiction with the defendant's residence. George, J., said: "The plaintiff's place of business is his proper description. Refuse the motion." But he did not decide that the defendant could not come in upon judgment, and then prove that the plaintiff had a residence in the same Civil Bill jurisdiction with himself, and that he was therefore not entitled to costs.

(1) 10 Ir. C. L. R. (App. xxiv.) (2) 6 Ir. Jur. (O. S.) 177.
(3) 1 Ir. L. T. 102.

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In *Re A. Solicitor* (1) was simply a case of false description. The report of the judgment of Huddlestone, B., is long, but the point is clear and short. The plaintiff was a foreigner: his residence was given as Paul Street, Finsbury, London, to evade giving security for costs. But he actually resided in Vienna. Huddlestone, B., said:—

> "There could be no mistake as to what residence meant. It did not necessary mean the place where he slept; he might pass the day elsewhere. But what the solicitor stated was that Harpeles resided in Paul Street, Finsbury. He resided and carried on business in Vienna, and had no name or description up in Paul Street, Finsbury. He lived in Vienna, and occasionally came over to this country."

The description was absolutely false, and the only question was whether the solicitor was responsible for having defeated the defendant's right to security by the falsehood.

Mr. Law Smith referred us to an apposite passage in Green on Bills of Sale, showing how we may help ourselves to a conclusion, where the word used is ambiguous:—(p. 182).

> "The identification of the attesting witness, with a view to obtain information if necessary, is, it must be recollected, the object with which the witness's description is required; and it has been held that the office or place of business where the person may be usually found during the day, sufficiently, *and indeed more appropriately*, satisfies the requirement of the statute as to residence in the case of the attesting witness. This was expressly decided under the Act of 1854 by the Court of Queen's Bench in *Blackwell* v. *England* (2), and by the Court of Exchequer in *Attenborough* v. *Thompson* (3). In both of these cases the place of business of the attesting witness was given. It appeared in each case that the party spent the greater part of every day there, though he took his meals and slept elsewhere. These cases came before the respective Courts contemporaneously."

In both these cases it was held that a place where a man never ate, drank, or slept, satisfied the description of his residence.

In *Blackwell* v. *England* (2), Erle, C.J., said:—

> "Residence is a word capable of several meanings. Whenever a word so capable is found in an Act of Parliament, we look at the

(1) 33 Sol. Jour. 301. (2) 8 El. & Bl. 541. (3) 2 H. & N. 559.

object of the Legislature, in order to ascertain what meaning the word, when so used, was intended to bear. The Act (17 & 18 Vict. c. 36) was intended to prevent secret frauds by means of bills of sale. The object of the enactment in question was to enable the party who suspected a secret fraud to trace the witness, and so make inquiry. For this purpose his residence is to be given. Which meaning given to the word will best effectuate that object? I hold it to be impossible for anyone whose mind is not perverted by too much technical knowledge to doubt that the purpose is better effectuated by giving the place where the witness passes all his active hours—the place of business—than by giving the place of pernoctation."

I take the liberty of applying these words to our case. The object of our Act might be defeated, and certainly would not be advanced, by holding that those magistrates only were entitled to notice of licensing applications whose "place of pernoctation" was in the town of Strabane, and that they were non-resident if they had, as most of our Dublin merchants have, private houses in the suburbs.

The nearest licensed publican, which Mr. Bradley was, would be about the most likely person to fulfil the practical object of the Act, and none the less so because he could afford not to sleep over his shop. A man daily carrying on his business in person close by would be better than a person who merely had a sleeping-place in the neighbourhood, but who might be all day, and even most of his time, away on business or on pleasure. Therefore, it only remains to see that there was sufficient evidence, in fact, that Mr. Bradley spent enough of his time in his shop to warrant the finding that he had a residence there. His brother magistrates may be assumed to have known where and how he lived. He was licensed, and he carried on his business in person, and he spent most of his active hours at his business. They held that he was "resident" at his public-house, where he was usually to be found, and to which all his business letters and his general correspondence were addressed. In my opinion there was ample evidence to sustain the finding, and on an application for a writ of *certiorari* we could not set it aside unless there was *no evidence* to support it.

The subsequent affidavits attempt to minimise the amount of time and attention given by Mr. Bradley to his business as a

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publican, and to show that, beside whatever time he spends at his private house, he is at times engaged in buying flax. But it is proved that he attends in person to his business at the public-house daily, that it is the place to which his letters are addressed, and where he is generally to be found, and that he is there, as a rule, except when he is in the market-place on market days during the flax-buying season, or when he is eating drinking sleeping or resting at his *private* residence, where he ought not to be troubled with notices under the Licensing Acts. Accordingly the appeal must be allowed, and the conditional order must be discharged, with costs here and below.

If there were any reason to suppose that Mr. Bradley had been selected for service from an improper motive, I should hold that this would supply evidence, against the person actuated by such a motive, to show that the place of service was known by him not to be the place of residence. But there is no evidence whatever that Bradley was served rather than Gallagher, for any other reason than that he was believed and known to be one of "the next resident magistrates."

If the observations upon "residence" of the majority of the Judges in *Reg.* v. *Justices of Fermanagh* (1) be correct—and I doubt some of them—the case is distinguishable upon its facts, because there the trader was not personally to be found at his place of business.

Walker, L. J.:—

I concur. The question turns on the meaning of the word "residence" in the second section of this statute, 3 & 4 Wm. 4, c. 68. It occurs twice in the section. In the first place where it occurs it means the nearest magistrate having a residence. The contrast was between a resident magistrate and an absentee magistrate. There is no doubt that primarily "residence" means the place where a man takes his meals and sleeps; but it may have a more extended meaning, namely, place of business. The question then is whether this magistrate, Mr. Bradley, has not two residences within the meaning of this Act of Parliament? Bradley

(1) [1897] 2 I. R. 559.

is a publican who carries on business in Strabane, presumably by himself, and not with the help of another. On the authorities Bradley might have two residences for the purposes, and within the meaning, of some Acts of Parliament. For example, the Bills of Sale Act; if he attested a bill of sale, stating as his residence, his place of business in Strabane, it would be good under these English cases: *Blackwell* v. *England* (1); *Attenborough* v. *Thompson* (2).

When we come to consider the object of this Act, this view is still more clear. The place of business may be also a residence, because the magistrate would be more likely at his place of business to have knowledge of the applicant.

If Mr. Wylie is right in his contention, it would be right to leave out this magistrate, Mr. Bradley, from the magistrates to be served by the Clerk of the Peace with a copy of the list of the applicants, as directed later on in the section, because he did not eat and sleep on the premises.

Then we come to the question of fact. It appeared before the Quarter Sessions that Bradley was a publican, and that he attended during business hours at his place of business—he received his letters there, got invoices for goods there, and generally transacted business there. We cannot infer that the Quarter Sessions Court was wrong in point of fact: it lay on the other side to show that this place was not a residence by reason of non-attendance. Unless they were wrong in point of law we have no right to quash the order on *certiorari*.

HOLMES, L. J.:—

When this appeal was opened, I thought that there was involved in it a single question of law, simple, but important; and now that the arguments have concluded, I retain the same opinion. The Act 3 & 4 Wm. 4, c. 68, section 2 provides that as a preliminary to obtaining an original publican's licence, notice of the application must be given to (amongst others) each of the two next resident magistrates. We are all agreed that by these

(1) 8 El. & Bl. 541. (2) 2 H. & N. 559.

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words are meant the two Justices of the Peace whose residences are nearest the house for which the licence is sought.

The appellant in this case applied to the Quarter Sessions in Strabane for a licence for a house situated in that town, and objection was taken that one of the Justices served did not fulfil the above condition. It appeared that he had two houses in the town, in one of which he took his meals with his family and slept; and in the other he carried on his business as a publican. If the latter can be considered as a residence of the Justice within the meaning of the statute, the notice was good; but if his only residence was the dwelling-house, the notice was bad.

I am not at liberty to assume that any further evidence was given on this subject at the Quarter Sessions; and upon it the Chairman ruled against the objection.

Affidavits have been filed in the Divisional Court, giving very conflicting accounts of the mode in which the magistrate in question occupied his business premises; but even if we are at liberty to consider the statements contained therein, I agree with the view of the Lord Chief Baron, as appears from what seems an accurate report of his judgment, that they do not lead to the inference that this case differs in any way from the usual one of a man carrying on business in one house, and occupying, at the same time, another as a dwelling for himself and family. He is probably often not to be found in either, but he may be assumed to be for the most part in the one place during business hours, and in the other in times of leisure. The objection seems to have been dealt with on this basis at Quarter Sessions; and the point decided by the Divisional Court was that, in this state of circumstances, the business house was not a residence of the Justice.

Gibson, J., in *Gilbey's Case* (1), says: "The words 'residence' and 'place of abode' are flexible, and must be construed according to the object and intent of the particular legislation where they may be found. The cases on the subject are conveniently collected in Stroud's Dictionary, and Maxwell on Statutes. Primarily, they mean the dwelling and home where a man is supposed usually to live and sleep. This is their interpretation in registration; in

(1) [1897] 2 I. R. 563.

liquidation under the Act of 1869; and in Poor Law Settlement. They may also include a man's business abode, the place where he is to be found daily. They have this meaning in the Bills of Sale Act. In these cases personal presence seems an ingredient. To make the business house a residence, it must be not merely a place where business is transacted, but where the trader's duty and occupation would lead one to expect that, under ordinary circumstances, he would be found. Examples of both meanings, the more restricted and the more expanded, are supplied by our Common Law Procedure Acts. Our Licensing code has been interpreted in practice in the larger sense." This is, in my opinion, an accurate statement of the law, and of the result of decided cases.

That the true test for construing the word "residence" is to be found in the object and intent of the particular legislation where it occurs, has been recognized again and again. In *D'Arcy* v. *Hastings* (1), it was held that, in construing the 97th section of the Common Law Procedure Act of 1856, residence included a place of business, because the enactment showed the word was used in connexion with the jurisdiction of the Civil Bill Court. So too under the Bills of Sale Act, the residence of the witness has been held to include the office where he works, on the ground that the object is that he may be easily discovered, and this can be attained more certainly by giving the place where he does his business during the day than by the address where he is to be found at night.

Applying this test to the notice to be served on the two nearest resident magistrates, it is, I think, evident that the reason for selecting them is, that the intended application should be made known to the justices who, from their propinquity to the house for which the licence is asked, would be best acquainted with its suitability, the character of its occupier, and the requirements of the neighbourhood. But these are matters about which men having places of business hard by, where they attend daily, would be likely to have more information than the residents in private dwelling-houses. It is not denied that a man may have two residences within the meaning of the provision in question.

(1) 10 Ir. C. L. R., App. xxiv.

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Indeed Mr. Gallagher, on whom it is said the notice ought to have been served, has two residences—one his business premises near at hand, and another where his family lives in the country. He uses both for sleeping and taking his meals in. So too, I am of opinion, that Mr. Bradley has two residences for the purpose of the notice of application, although he only sleeps and eats in one of them, doing his business in the other. I therefore hold that the notice was properly served, and accordingly that the appeal ought to be allowed, and the conditional order discharged.

I have a word to say about *Stoy* v. *Rees* (1), on which Mr. Wylie relied so strongly. That case relates to a Rule under the Judicature Act and the form thereby prescribed, and is not very satisfactorily reported. I can only say that if it decided that a defendant is entitled to have a writ of summons set aside, where the plaintiff's address as given therein, is a house of his own, in which he carries on his business, merely because he sleeps elsewhere; it does not carry conviction to my mind. There is hardly a great establishment in the business parts of this city which is not owned by a person having a private residence out of town; and I take the liberty of thinking that the address of the former would be sufficient in a writ of summons issued under the Judicature Rules. It will, however, be soon enough to say more on this point, when the question arises.

Solicitor for the prosecutor: *E. J. O'Doherty.*
Solicitor for M'Donnell: *P. Gallagher.*

R. D. M.

(1) 24 Q. B. D. 748.

PHILIP GILLIGAN AND MICHAEL NUGENT *v.* THE NATIONAL BANK, LIMITED (1).

Q. B. Div. 1901.

Jan. 17, 18, 22. Feb. 4.

(1900. No. 4900.)

Title-deeds—Equitable deposit—Contract—Injury to the deeds—Negligence—Right to damages pending redemption—Conveyancing Act, 1881, *sect.* 16, *sub-sect.* 1.

G. deposited the title deeds of his premises with the bank by way of equitable mortgage, to secure advances made to him from time to time. While so deposited, the deeds were greatly damaged by the flooding, on the occasion of an exceptional rain-fall, of the basement of the bank premises in which they were stored, and by reason of their injured condition, G. was obliged to abandon a contemplated sale of the premises. Without offering to redeem, G. commenced an action for damages against the bank for negligence in the care and custody of the deeds,

Held, that until redemption, G. had no right of action for damages against the bank.

There is no implied covenant on the part of a mortgagee to take reasonable care of the title-deeds during the continuance of the security.

The nature of an equitable mortgage by deposit of title-deeds considered.

Per Barton, J.: *Brown v. Sewell* (11 Ha. 49) and other cases, in which indemnity and compensation have been decreed to mortgagors for loss of title-deeds by mortgagees, are not founded on the hypothesis of an implied covenant by the mortgagee to take care of the deeds, but are referable to the ancient jurisdiction of Courts of Equity to give relief in cases of Accident.

THIS was action by Philip Gilligan against the National Bank, Limited, for negligence in the care and custody of certain title deeds. The co-plaintiff Michael Nugent was joined as surviving trustee of Philip Gilligan's marriage settlement, dated the 14th October, 1873.

Philip Gilligan was the owner of premises in Middle Abbey-street, Dublin, to which a seven-day license was attached. In order to secure advances, which at the time of the action amounted to £1700, he had deposited his title-deeds with the National Bank. Owing to the death of his wife, and his own illness, it became desirable in the spring of 1900 to sell the premises, and

(1) Before MURPHY, MADDEN, BOYD, and BARTON, JJ.

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accordingly his solicitor prepared conditions of sale, and fixed the 6th April, 1900, for the auction. On the 8th March, 1900, the solicitor informed the bank that he required to see the title-deeds. The bank made no difficulty in complying with this request, and the title-deeds were sent to him a few days later in a brown paper parcel. When they arrived some of them were so damaged by water as to be partly illegible, and the parchments of which they were composed were so stuck together that they could not be opened. The paper deeds amongst the number were not damaged to the same extent. In consequence of the condition of the deeds the solicitor could not prepare the title. It was then ascertained by the plaintiff that the cause of the injury to the deeds was the flooding of the basement in which they lay on the night of the 5th August, or morning of the 6th August, 1899, when there was a violent thunderstorm and abnormal rainfall. According to statistics kept at the Botanic Gardens, Glasnevin, the rainfall on the occasion had only been exceeded on three occasions since 1869. Gilligan's deeds had been kept on the lowest tray in a safe near the bullion room, this safe having a number of perforations for the purpose of ventilation. On the night of the storm dark muddy water rose in the chamber to a height of 18 inches and covered Gilligan's deeds. The 6th August was Sunday, and the following day was Bank Holiday, and as the various persons who had the keys leading to the strong room did not come together until Tuesday, the deeds lay submerged until then. Precautions were taken on the Tuesday to have the deeds dried as soon as possible, and after fourteen days they were put back into the safe, which was stated to be the only place on the bank's premises in which they would be safe from fire. Information as to what had happened was sent round to all persons whose deeds were deposited for safe keeping, but not to those whose deeds were deposited on equitable mortgages. The deeds of a building society, injured on the same occasion, were, on receipt of this notice, sent by the owners to Mr. Tucker of the Public Record Office, who successfully treated them. Mr. Tucker, examined as an expert, gave it as his opinion that he could have done the same with Gilligan's deeds if they had been given to him in time. It was stated that the bank's own deeds were on the night of the flood in the same strong room, but it did

not appear upon what tray they were placed. The district in which the bank is situated was stated to be subject to flooding, rendering special precautions necessary. The bank claimed that they had taken special precautions. The place was flooded in 1891, after which the bank put in a tidal valve which was the most effective appliance that could be used for the purpose, but which, it was admitted, might be put out of order in exceptional circumstances. The basements of many of the adjoining buildings were flooded on the same night.

The value of the premises was about £6300, and it was stated that part of the money for the purchase of public-houses at high figures was usually borrowed from a bank or some other source on the security of the title-deeds. The non-production of the title-deeds on the occasion of such a sale would necessarily affect the amount of the purchase-money, the depreciation being estimated by one witness at £500. The cost of obtaining a declaration of title was variously estimated by plaintiffs' and defendants' witnesses at from £350 to £200, and it was said by the latter that registration under the local Registration of Title Act might be obtained for £35, allowing from £5 to £10 for the extra expense occasioned by the condition of the deeds.

The charges affecting the premises were set out in the following order:—(1) Nugent, as trustee of the marriage settlement, secured by a term of years, £500; (2) the Bank, £1700; (3) the Dolphin Hotel, £788 10*s.*; (4) Nugent, in his private capacity, £3031. Total, £6019 10*s.*

The action was tried before the Lord Chief Baron and a city special jury on the 6th, 7th, and 8th November, 1900. The defendants asked for a direction on the grounds (1) that there was no evidence of negligence causing the flood; (2) that there was no evidence of injury from the same cause; and (3) that the plaintiff had failed to prove damage. The Lord Chief Baron refused to direct.

The following were the questions left to the jury and their answers:—

1. Were the defendants negligent in storing the plaintiff's deeds in the lower shelf in the safe in question in the manner in which they stored?—Yes.

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2. If so, did the plaintiffs thereby sustain damage, and if so, to what amount?—£350.

On the assumption that the defendants were not negligent in storing the deeds, answer the following questions:—

3. Were the deeds left in the safe for an unreasonable time after the defendants were aware of the flood, and if so, were the defendants negligent in leaving them there for such unreasonable time, and if so, did the plaintiffs thereby sustain damage, and if so, to what amount?

4. Were the defendants negligent in the treatment of the deeds after they were taken out of the safe, and if so, did the plaintiffs thereby sustain damage, and if so to what amount?

5. Were the defendants negligent in omitting to give the plaintiffs within a reasonable time notice of the injury to the deeds, and if so, did the plaintiffs thereby sustain damage, and if so, to what amount?

6. If you find damages on Nos. 3, 4, and 5, state whether what you assess on same, one sum or cumulative sums.

The latter questions were not answered, it being unnecessary as indicated by the Lord Chief Baron, in view of the findings on Nos. 1 and 2.

The Lord Chief Baron gave judgment for the plaintiffs for £350 with costs.

The defendants now moved that this verdict and judgment should be set aside, and that a verdict should be entered for them dismissing the plaintiff's action with costs on the ground of non-direction of the learned Judge in not having directed a verdict for the defendants on the ground that there was no evidence to go to the jury, and that there was no evidence to support the findings of the jury to question No. 1 left to them by the learned Judge, or in the alternative for a new trial on the ground that the findings of the jury upon the questions left to them by the learned Judge were against the evidence and the weight of evidence, and that there was no evidence to support the finding of the jury on the questions left to them by the learned Judge, and that the damages awarded by the jury were excessive, or for such other order as to the Court should seem right.

Campbell, Q.C. (with him *Matheson, Q.C.*, and *Herbert Wilson*), for the defendants:—

For the first time as far as we can find a person who had deposited title-deeds with a bank, not for safe custody but as security for the advance of a substantial sum of money, has been allowed to sustain a common law action against that bank for negligent custody of those deeds, without any suggestion or offer to redeem or to pay off the charge. At the present moment the entire sum of £1700 is due to the bank. The plaintiff has not any interest in those deeds, even reversionary, and it was in order to get rid of that difficulty that they joined Nugent as trustee of the marriage settlement of Gilligan. We raised the point at the trial, that, as Nugent's charge was only for £500, he was absolutely secure. In reply to that objection, the Lord Chief Baron pointed out that Nugent was also a tail incumbrancer, and in that capacity he could sustain an action. If that be so every puisne incumbrancer is in the same position. The plaintiffs closed their case without any proof of negligence, except that the deeds were damaged. In March, 1900, the plaintiffs' solicitor applied to the bank for the deeds, and the bank informed him that in the previous month of August the deeds had been injured by a flood. Prior to 1888 the premises had been flooded occasionally. In that year the bank gave their architect *carte blanche* to make these rooms as strong as possible, and accordingly he introduced, at great expense, a tidal valve which was the best appliance known to science. The bank had valuable documents of their own, side by side with the plaintiffs' documents, and they were also badly injured. The plate and bullion-room was also flooded, and the property injured. So were the plate and bullion rooms of the adjoining banks. For seven years after the tidal valve was put in there was not a trace of flood.

Lord Macnaghten's judgment in *The Bank of New Zealand* v. *O'Connor* (1), disposes of all objection to our contention upon the first branch, that the plaintiff, not having the property in the deeds, is not entitled to recover in this action. See also *Carter* v. *Wake*(2);

(1) 14 A. C. 273. (2) 4 Ch. D. 605.

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Lord Midleton v. *Eliot*(1); *Jones* v. *Lewes* (2); *Smith* v. *Bricknell*(3); *Stokoe* v. *Robson* (4); *Hornby* v. *Macham* (5); *Brown* v. *Sewell* (6); *James* v. *Rumsey* (7). The Chief Baron took the relation of the bank and Gilligan as one of bailee and bailor. See *Brown* v. *Sewell* (6), for the method of compensating for loss of deeds upon redemption. There was no evidence of such negligence as would make bailees such as the bank liable. The bank got no reward for the keeping of the deeds: *Giblin* v. *M'Mullen* (8), and *The United Service Company; Johnson's Claim* (9). What more could the Bank do than employ the best expert available, and put the place right after the flood: *Searle* v. *Laverick* (10); Joyce on Injunctions, at page 1332: also *Loder* v. *Arnold* (11); *Nitro-Phosphate Company* v. *London and St. Katherine's Docks Company* (12), and Carver on Carriers, last ed., p. 10.

[BOYD, J., referred to *Daniel* v. *The Metropolitan Railway Company* (13)].

The action is wholly unsustainable, and our defence that these deeds became the Bank's property as security for £1700, which up to the date of the bringing of the action remained unpaid, was a complete answer to the action. There has been complete misdirection—first, in dealing with this as a bailment, and second, upon the measure of damages, because assuming there to have been evidence that the Local Registration of Title Act applied, and could have been put in force for £35, the Lord Chief Baron should have placed that measure of damages before the jury.

Ronan, Q.C. (with him *Bushe, Q.C.*, and *D. F. Browne*), for the plaintiffs:—

If there was a memorandum of deposit to the effect that the Bank should take due and reasonable care of the deeds, there

(1) 15 Sim. 531.
(2) 2 Ves. 240.
(3) 3 Ves. & B. 51.
(4) 3 Ves. & B. 51; 19 Ves. 385.
(5) 16 Sim. 325.
(6) 11 Ha. 49.
(7) 11 Ch. D. 398.
(8) L. R. 2 P. C. 317.
(9) L. R. 6 Ch. 212.
(10) L. R. 9 Q. B. 122.
(11) 15 Jur. 117.
(12) 9 Ch. D. 503.
(13) L. R. 5 H. L. 45.

would be no doubt of the right to recover. The vital question is:— Do the nature of the duties and obligations between mortgagor and mortgagee spring from contract or anything else? See pp. 9 and 10 last ed., Leake: "Contracts created by agreement . . . whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting may be the same." If I can satisfy you that there was an implied contract, the consequences are the same as if it were express. Where you have proved, or can prove, a lawful contract, you can bring an action for the breach of it, and recover damages, but you must prove your contract. The reason why you have not had actions of this kind before, is that you could not prove your contract. (See Fisher on Mortgages, Introduction). Mortgages undoubtedly arise from contract. A mortgage at law is an absolute conveyance of lands with a clause that when the mortgage-money is paid, the mortgagee will reconvey. Equity regards a mortgage as a loan secured by a charge on the lands. A Court of Equity tears up the written contract between the parties, and says that it is not the real contract at all—it is a different contract altogether. There is some implied contract about the deeds—what is it?

[MURPHY, J.—On the day O'Connell went to see the deeds had he a right to see them?]

On that point I refer to sect. 16, sub-sect. 1 of the Conveyancing Act, 1881, which was prior to this transaction, and gives the right—the mortgagor is entitled to sell the lands subject to the mortgage. The Conveyancing Act compels the mortgagee, not only to re-convey, but to assign the mortgaged property to any person to whom the mortgagor calls upon him to assign it. That is what Mr. O'Connell wanted to do. He was entitled to furnish copies of all documents to the purchaser, and then say in the margin, "the originals will be handed over to the purchaser upon the completion of the purchase."

[MURPHY, J.—Mr. O'Connell, on behalf of his client, considered that he had a valuable interest in this property over and above the mortgage. He determined by his client's instructions to get a sale for that interest. He went to the Bank to see

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what contract he could enter into with an intending purchaser, or what contract the auctioneer could enter into. They make no difficulty at all about showing him the deeds, such as they are, and they say, "Here are your deeds, but look at the condition they are in." There is one deed which is entirely illegible, and no one can make out how a copy of it can be made. He tells this to the man who has employed him, and he says: "There is no use in your going on or attempting a sale with your title-deeds in this condition. I cannot put it in my advertisements that the title-deeds will be handed over." In consequence of that he is not able to carry out the sale. He has incurred expense preparing for it, and he must incur considerably more, if an attempt is made to effect a sale. There is no attempt to say that the equity of redemption is worthless, nor was it suggested during the trial. But O'Connell, on behalf of the mortgagor, cannot proceed to realize what he wants, viz. the value of the equity of redemption, and how does this arise? Because of the injury done to the documents. That has been done by the act of the Bank; if it is so, is not there a present injury to him?]

The contrary seems to me to be unarguable. That section contemplates a man having the present right that Mr. Justice Murphy refers to. If the statute gives a man the right to inspect and take copies of the documents, is the other, either by withholding them or by gross negligence, as I suggest, to defeat the operation of the section. Now is the injury that is done to him a breach of contract? that is the only other question. Take now the case of a mortgagee who commits waste. As I understand Mr. Campbell, the deeds are simply incident to the lands, and whatever duties or contracts a Court of Equity regards as to the lands, there will be a corresponding contract in reference to the deeds. If a mortgagee in possession commits waste, a Court of Equity will restrain him. What jurisdiction is there in a Court of Equity to do that? The mortgagee is in possession, and the only right of the mortgagor is to say that there is a contract about this land, express or implied, and you are dealing with this land in breach of that contract, and the only jurisdiction of the Court of Equity is to restrain the breach of that contract. There never has been an action for damages between mortgagor

and mortgagee, but is there any doubt that since Lord Cairns' Act, the Court of Chancery would have jurisdiction to give damages if such an action were brought. (See Lord Cairns' Act, sect. 1.) Pending the security, and before any offer of redemption, the Court would have ample jurisdiction to give damages for waste committed by the mortgagee in possession.

If the security is sufficient, waste will be restrained; but if the lands are not sufficient security for the debt, waste will not be restrained. Before Lord Cairns' Act and the Judicature Act, in the case of an express contract to take care of the deeds, the right of the mortgagor would be to have that contract performed. What were the remedies for the breach of it? If you wanted an injunction to restrain the breach, you went to the Court of Chancery. If you wanted damages, you went into a Court of Law, but you could not get both in either Court. The consequences were the same in the case of an implied contract. The only difference was in the mode of proof. I proved my contract, and I got my injunction against waste. If I wanted to get damages for waste, I went into a Court of Common Law, and said exactly the same thing, as I said in the Court of Chancery. The Court of Common Law would ask me where was my contract, and I would throw down my parchment. Owing to the nature of the mortgage, the contract sought to be enforced could only be proved in a Court of Equity, and could not be proved in a Court of Law, because a Court of Law treated the mortgage as an absolute conveyance, and not as security for a debt. All the foregoing has reference to the law, as it stood before Lord Cairns' Act and the Judicature Act. If the defendants had our deeds in a tub, and said: "We intend to keep them in a tub," we would have had a right to an injunction, and, since Lord Cairns' Act, we would be entitled to recover damages.

There is not a word about bailment in the pleadings. (Paragraph 1 of the Statement of Claim only pleaded the facts.) Mr. Justice Story's definition of a bailment, which has always been accepted, is, "the delivery of a chattel to another person, on trust for a certain purpose." I have already pointed out that the reason why no action was ever brought for injury to title-deeds, was that the only Court in which you could prove the

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contract could only give you the remedy by injunction, and had no power to give damages. But the moment Lord Cairns' Act passed, wherever you could get an injunction you can get damages. Suppose this action was brought in the Chancery Division. The Court of Chancery has now in all cases, irrespective of injunction or anything else, all the jurisdiction of a Court of Law, to give the appropriate remedy for a contract proved there. Once I prove my implied contract in a Court of Law, I am in precisely the same position as if I had an express contract, and if there were a memorandum of deposit of these deeds, "the Bank hereby agrees to hold these deeds as security for the debt, to return them on payment of the debt, and in the meantime to take due and proper care of them," will my friends then deny that this action would lie?

[MADDEN, J.:—But if the mortgagor recovers say £500 damages, could he put that in his pocket?]

The mortgagee could set off his debt. (See Beven on Negligence, pp. 880 and 938, in reference to a pledge.) All that the pledgor requires is the personal contract of the pledgee that on payment of the money, the bond shall be given up to him, and that in the mean time due care will be taken of the article pledged. The property according to the rules of Equity remains in the mortgagor. See *Donald* v. *Suckling* (1), where Lord Blackburn's statement of the nature of a pledge is to be found. Story divides bailments into three classes, at pp. 4 and 5. In an equitable mortgage the contract is for the benefit of both mortgagor and mortgagee. Is there any implied contract? Beyond all question, there is one to give up the deeds upon payment. Upon a legal mortgage the plaintiffs' right would be the same. What is the contract about the deeds? Is it an absolute contract to return them? If it is, when redemption comes the mortgagee is liable for not returning them no matter from what cause—if there is an absolute contract, inevitable accident does not matter: *Brown* v. *Sewell* (2).

Mr. Campbell's argument came to this—it is a contract to take due and reasonable care provided always that the mortgagor shall

(1) L. R. 1 Q. B. 585. (2) 11 Ha. 49.

not be entitled to insist upon this duty until the time of redemption. In other words the bank could keep the documents in a tub. Suppose it was a case of injury to lands—cutting ancient pasture or keeping pigs in the drawing-room, would not an action lie at the suit of a remainderman who wanted to sell his remainder?

[BARTON, J.—Does not Lord Macnaghten deal with the case, and say that he has no right to the deeds?]

That was in reference to a case in New Zealand where there was no such section of the Conveyancing Act.

[MADDEN, J.—What is the measure of damages?]

Loss in the selling value of the property by reason of the title being defective. In *Lord Midleton* v. *Eliot* (1), the indemnity is any loss which the mortgagor, his heirs and assigns, may sustain in any manner whatsoever. In *Hornby* v. *Matcham* (2) it is the damage to the estate by the loss of the deeds. One witness stated that registration of title could be obtained for £35. The Chief Baron was not asked to place that measure of damages before the jury: he did not do so, and it was not misdirection that he did not. It is no part of the notice of motion that the Chief Baron mis-directed them on this point.

All the correlative rights and duties between mortgagor and mortgagee are the creation of contract. Legally the results of implied contract are the same as those of express contract, the only difference being a difference of proof. If there had been an express contract to take due and reasonable care of the deeds, the case would be unarguable. You must take it that there was a contract to that effect: otherwise they would have been entitled to keep the deeds in a tub. If I am right in saying that, in the case of the tub, there would be a right to an injunction, under Lord Cairns' Act, there would be a right to damages. Where the Courts deal with the obligation of the mortgagee, they do it by comparison with the duty of the bailee, and there is no doubt that the duty of the bailee is to take care pending redemption.

(1) 15 Sim. 531, at p. 537. (2) 16 Sim. 325.

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Matheson, Q.C., in reply:—

In *Millet* v. *Davey* (1), the Master of the Rolls sums up the law at p. 475: see Kerr on Injunctions, p. 80. As long as a mortgagee acts *bona fide*, a Court of Equity will not interfere with him. If he unnecessarily or wantonly destroys any part of the inheritance, he will have to account for that part of the inheritance, that is, if it is not for the benefit of his security. But if his security is deficient, or if it is doubtful whether his security is sufficient, he is entitled to destroy the inheritance in order to render his security sufficient. I see no case in which the Court of Equity will interfere in reference to the deeds except where there is a threatened wanton destruction of the deeds.

[MURPHY, J.—Has the mortgagor the right to sell his equity of redemption?]

Of course he has, but he has not the right to get the deeds until redemption.

[MURPHY, J.—The bank made no objection at all to showing him the deeds, such as they were, and he was making preparations and incurring expense for the sale of the equity of redemption. But when they produced the deeds he says: "I cannot go on with this sale in consequence of the condition of the deeds and in consequence of your act," and that causes him immediate loss—has he no remedy for that?]

Absolutely none in point of law. Such an action must be founded on some special contract. Where do you get any such contract? He can sell his equity of redemption, but if he finds he cannot make title to it by reason of the condition of the deeds, he has no action against the mortgagee. He must come in and redeem. He was not prevented, in fact, from selling. He could have sold his equity of redemption at a loss if he liked; but until he did sell, there could be no right of action. As a matter of fact Mr. Gilligan's equity of redemption is worth nothing. No actual damage was proved under this head. If the Chief Baron's view is right, every one of the puisne mortgagees could come against us for damages, and recover the £350 over again.

(1) 31 Beav. 470.

[MADDEN, J.—Is there no obligation to take reasonable care in the meantime?]

None until the period of redemption arises. I cannot be asked to account for the lands, or the deeds until there is an offer to redeem.

[MURPHY, J.—If this £350 goes to Gilligan, of course the incumbrancers will never get a penny of it?]

Not a penny of it. If the Chief Baron is right, I see no answer to another action by the Dolphin Hotel Company.

[MURPHY, J.—This only shows the inconvenience of an action of this kind before the account is taken in a redemption suit?]

See Ashburner on Mortgages, p. 562. Compensation is also open to the mortgagor where loss was occasioned by the wilful default of the mortgagee: *Hornby* v. *Macham* (1) and *Brown* v. *Sewell* (2). A Court of Equity will not interfere to restrain waste except some wanton act of destruction is committed, and then upon the principle that it will not allow property to be destroyed. It does not follow that a common law action will lie in such a case. The section of the Conveyancing Act is strongly in our favour. It only applies to mortgages after the passing of the Act. If Mr. Ronan is right, that there always was an obligation to take reasonable care, where was the necessity for that section, because, if that obligation existed before the Act, it would have carried with it the right to see the deeds and to see that they were being properly cared for.

[MURPHY, J.—Supposing that there was a suit for redemption, and that the property was sold, and that the three mortgagees, totting up, found that the last mortgagee was £350 short. He says to Gilligan, "You must give me this, because you got it in an action for the injury to the deeds, and *non constat* if the deeds were all right, we would have got £350 more for the property." What right of action would he have against Gilligan in respect of the £350?]

No right whatever—Gilligan could put it in his pocket. As to the Registration of Title Act, we say that registration could have been obtained for £35.

(1) 16 Sim. 325. (2) 11 Ha. 49.

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[BOYD, J., referred to *Daniel* v. *Metropolitan Railway Company* (1) and *D. F. Browne* to *Withrington* v. *Banks* (2).]

MADDEN, J.:—

The plaintiff Gilligan deposited with the defendants the title-deeds relating to a certain licensed house and premises, by way of equitable mortgage, to secure the amount which might from time to time become due on his current account. At that time Gilligan was seised of the premises in fee-farm, subject to a term of years created by his marriage settlement, and vested in the plaintiff Nugent, for the purpose of securing a charge of £500. Nugent had a charge on the premises puisne to the defendants' equitable mortgage, but, for reasons which will presently appear, he may be left out of consideration in dealing with the case which has been presented to us.

While the title-deeds were in the possession of the Bank, as equitable mortgagees, they were seriously injured by the flooding of the strong room in which they were kept. I will assume that this occurred through the negligence of the defendants, by reason of a failure on their part to take such precautions against the danger of flooding, as a man might fairly be expected to take for the protection of his own property. The jury have so found. But before we approach the consideration of their finding, the preliminary question must be determined;—even if the defendants were negligent, has the plaintiff a right of action?

The answer to this question depends on the relation which subsisted between the plaintiff and the defendants at the time of the occurrence. It was that of mortgagor and mortgagee of real estate. The mortgage was the kind of equitable mortgage which is created by deposit of title-deeds, for the purpose of securing a debt. This security must be carefully distinguished from a pledge of chattels. The title-deeds of real estate are not chattels in the eye of the law. They are a part of the realty. The property in the deeds always passed under a conveyance of the freehold. No

(1) L. R. 5 H. L. 45. (2) Sel. Ca. in Ch. 30.

doubt title-deeds were mentioned in the older precedents, but this specification was mere verbiage, as unnecessary as the enumeration of "woods, underwoods," and so forth, and it is not to be found in modern precedents. So far was this principle carried that the title-deeds, or charters, under which an estate was held, imparted the character of realty to the strong box in which they were kept. It is laid down by Lord Coke (3 Inst.) that there cannot be larceny of either title-deeds or strong box, any more than of the realty with which they are regarded as incorporated. This principle is the foundation of the doctrine of equitable mortgage by deposit. If the security thus created amounted to no more than an agreement to execute a legal mortgage, it would be void under the Statute of Frauds, not being in writing. In reply to the argument addressed to him founded on this statute, Lord Loughborough says:—"The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not *to be* performed, but is executed." This principle was applied in the same case by Lord Thurlow in subsequent proceedings in the same case: *Russel* v. *Russel* (1). From the date of this case, by which the validity of an equitable mortgage by deposit was established, down to the present day, the security thus created has been the subject of numerous decisions. The deposit of a document of title was always treated in equity as creating a charge upon the property to which the document related, to the extent of the interest of the person making the deposit, and as amounting to an agreement to execute a legal mortgage of this interest, containing all usual clauses. But the precise legal operation and effect of such a deposit was not, I think, accurately ascertained before the recent decision of the Judicial Committee of the Privy Council in *The Bank of New South Wales* v. *O'Connor* (2).

In that case title-deeds had been deposited by a trader with a Bank to secure a debt. The equitable mortgagor, in order to get up his deeds, tendered to the mortgagee a sum of money in respect of principal, interest, and costs. For the purposes of the decision it is to be taken that this sum was sufficient, and that it was improperly rejected by the Bank. Thereupon the mortgagor brought

(1) 1 Bro. C. C. 269. (2) 14 A. C. 273.

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an action of detinue for the recovery of the deeds. The Supreme Court of Victoria (where the legal principles applicable to the case are the same as here) held that the contract was broken by the Bank when a sum of money was tendered which ought to have been accepted, and that the subsequent detention of the deeds was wrongful, and therefore actionable.

This decision was reversed by the Judicial Committee of the Privy Council. Lord Macnaghten, who delivered the judgment of the Privy Council, in dealing with the proposition that a tender properly made, and improperly rejected, is equivalent to payment in the case of a mortgage, states certain principles which are of importance in regard to the present case. "The proposition seems to be founded on a mistaken analogy. If a chattel be pledged the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law that special property is determined if a proper tender is made and refused. The pledgee then becomes a wrong-doer. The pledgor can at once recover the chattel by action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor, coming into equity to redeem, must do equity and pay principal, interest, and costs, before he can recover the property which at law is not his. So it is in the case of an equitable mortgage," the nature of which he proceeds to explain:—"Before the fusion of law and equity, a Court of Equity would undoubtedly have restrained the legal owner of the property from recovering his title-deeds at law so long as the charge continued, and now when law and equity are both administered by the same Court, if there be any conflict the rules of equity must prevail. . . . It would be contrary to equity to order a mortgagee to deliver up the title-deeds of property on which he has a security upon any other terms" than payment either directly or into Court. "A mortgagor has no right even to see the deeds before payment."

From this clear statement of the law it appears, first, that the proprietary rights of an equitable mortgagee in the title-deeds which he holds are, prior to payment and redemption, the same as those of a legal mortgagee, and, secondly, that arguments derived

from the law of pledges or bailment of chattels are misleading, inasmuch as they are founded on a mistaken analogy. It is something more than a coincidence that in the case before us, as in the *The Bank of New South Wales* v. *O'Connor* (1), counsel for both plaintiffs and defendants were led astray by what Lord Macnaghten describes as a mistaken analogy. For it is a natural consequence of the state of uncertainty out of which the law of equitable mortgage is gradually emerging. In the present case, it has the unfortunate result that we have not the guidance of the opinion of the Lord Chief Baron upon the novel view of the law which is now presented to us. By common consent at the trial, the case was dealt with on the assumption that the analogy of bailment of a chattel, for profit to the bailee, applied, and there are dicta in the books which go far to warrant this assumption. This position is now abandoned by both sides. Mr. Ronan rests his case not on bailment, but on covenant. In every legal mortgage there is, he contends, an implied covenant on the part of the mortgagee to take reasonable care of the title-deeds so long as they remain in his possession, the breach of which covenant confers on the mortgagor an immediate right of action, and a similar obligation is implied between equitable mortgagor and mortgagee. This view of the case disposes of any claim on the part of Nugent, who was joined as plaintiff, Mr. Ronan says, in order to have the entire estate represented in the action, and the case may be dealt with on the basis of implied contract, entered into between the plaintiffs and the defendants, by virtue of the deposit of title-deeds.

Two propositions essential to Mr. Ronan's argument are so clearly stated by Lord Macnaghten in the judgment from which I have quoted, that it is unnecessary to refer to any of the earlier authorities. It is plain that the rights and responsibilities of mortgagor and mortgagee, respectively, in relation to title-deeds are the same in the case of an equitable mortgage by deposit as in that of a legal mortgage by deed. It is also established that these rights and responsibilities, whatever they may be, are, since the Judicature Act, recognised and enforced

(1) 14 A. C. 273.

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in actions at law, as well as by proceedings in equity, in the case of an equitable mortgage.

I will also assume, for the purposes of argument, that the breach, at any time during the continuance of the security, of the implied contract, assuming its existence to be established, would create an immediate right of action, enforceable by the mortgagor independently of redemption.

Is there, then, implied from the relations of mortgagor and mortgagee such a covenant as that suggested by Mr. Ronan? No trace of such a suggestion is to be found in any text-book, or in any of the numberless decided cases in which the relation of mortgagor and mortgagee has come under consideration. The present is admittedly a case of first impression. Mr. Ronan ingeniously suggests that such an action could hardly have been brought before the Conveyancing Act conferred on the mortgagor a right to inspect the title-deeds during the continuance of the security; for the purpose, obviously of enabling him to make title to his equity. The suggestion is an ingenious one, and it would go a long way towards removing the difficulty in his way which is caused by the absence of authority for the proposition upon which his case rests, provided he were able to adduce any substantial reason for the implication of the covenant upon which he relies.

A certain obligation in regard to title-deeds undoubtedly rests upon a mortgagee, analogous to that which exists in relation to the lands, to which the title-deeds are, in the contemplation of the law annexed. The mortgagor has an equity of redemption. The nature of this equity has been recently considered by the Court of Appeal in England: *Rice* v. *Noakes & Co.* (1). The mortgagor on payment of the mortgage-debt is entitled to have the mortgaged property restored to him in its entirety, unfettered and undiminished in value. Collins, L.J., cites with approval the rule compendiously laid down by Cozens Hardy, J., in the judgment under appeal: "Once a mortgage always a mortgage" as still a sound legal maxim. Anything which is comprised in a mortgage security must, when the debt is paid or the obligation is discharged,

(1) [1900] 2 Ch. 445.

be returned to the mortgagor. It must be returned in its entirety; "no part of it can be retained by the mortgagee." Part of the mortgage security consists of the title-deeds. If the mortgagee cannot restore this portion of the mortgaged property undiminished in value, the mortgagor is entitled to compensation. In several reported cases this right has been recognised and enforced: *Brown* v. *Sewell* (1), and *Hornby* v. *Matcham* (2), are the principal authorities bearing on this point. In these, and in the other cases that have been referred to in which compensation has been given to a mortgagor for loss or destruction of title-deeds, the question has arisen on redemption of the mortgaged lands, and the reason why compensation is awarded is because the mortgaged property is not restored to the mortgagor in its entirety and undiminished in value. It is not easy to deduce from those cases the precise measure of the responsibility which rests upon a mortgagee in regard to the safe keeping of title-deeds, and traces are to be found of the mistaken analogy referred to by Lord Macnaghten. Thus in *Brown* v. *Sewell* (1) I find it stated that "a bailee is not liable for the consequences of such an accident where all reasonable care has been taken." But I do not consider it necessary to examine these cases with minute care. For they are all plainly founded on the equitable right of the mortgagor to get back the mortgaged property on redemption, in its entirety, and there is not a suggestion in any one of them of the existence of an implied covenant enforceable during the continuance of the security.

A mortgagee usually takes possession of the title-deeds, but he does not usually enter into possession of the lands. If he does, he is held accountable for wilful default; and Mr. Matheson suggests that he is under the same responsibility in regard to his possession of the title-deeds. It is not necessary to consider whether the measure of responsibility cast upon a mortgagee is precisely the same in regard to the title-deeds and the lands. It is clear that his responsibility in regard to the lands cannot be enforced at the suit of the mortgagor otherwise than in a redemption suit, and I can see no reason why a different principle should

(1) 11 Hare, 49. (2) 16 Sim. 325.

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apply as regards the title-deeds. Mr. Ronan supposes the case of a mortgagee who kept the title-deeds in a tub full of water, and he asks whether the Court of Chancery would not restrain him from wanton destruction of the deeds. Certainly, on the same principle in accordance with which a mortgagee in possession will be restrained from waste, or from wanton destruction of the subject-matter of the security. The intervention of the Court in such a case is founded on a recognition of the mortgagor's equity of redemption, and is an exercise of the jurisdiction always possessed by the Court for the preservation of property, for the benefit of all persons interested in it. It by no means follows that a covenant enforceable at law is to be implied on the part of the mortgagee. No doubt under Lord Cairns' Act the Court of Chancery has power to give damages in lieu of an injunction where this is the more appropriate remedy, and it is contended that in every such case an action for damages would lie at law. But the power to award damages was given in aid of the equitable jurisdiction of the Court, because in many cases the remedy by way of injunction was inadequate. It does not follow that a common law action can be brought in every case in which the Court may apply the common law remedy; still less does it follow from Lord Cairns' Act that a covenant between mortgagor and mortgagee is to be implied as the foundation of an action for damages.

The true key for the solution of the questions raised in this case, and in *The Bank of New South Wales* v. *O'Connor* (1) is to be found in the recognition of the principle of law by which title-deeds are regarded as part of the realty, and in avoiding the misleading analogies of pledge or bailment of chattels. This principle is the foundation upon which the security of an equitable mortgage by deposit has been built up by a series of decisions, which have been often regretted, but never over-ruled. The equitable mortgagee becomes the actual owner of the title-deeds by an accomplished fact, and he cannot be deprived of this ownership unless by redemption; he is thus outside the Statute of Frauds. He has acquired this ownership otherwise than by a "conveyance;"

(1) 14 A. C. 273.

he is, therefore, outside the provisions of the Registry Acts which postpone unregistered "conveyances." The deeds are his property until redemption. Why should a covenant on his part be implied to take reasonable care of what is his own? And why should such a covenant be implied in respect of the portion of the mortgaged property which consists of the title-deeds, and not in respect of the land? No doubt the property of the mortgagee in both land and deeds can be determined by an exercise of the equitable right of redemption. The time of redemption, or of foreclosure (or in Ireland of its equivalent, sale), is the time at which accounts are settled, and rights adjusted, between mortgagor and mortgagee as regards the land. Why not also as regards the title-deeds? I cannot see that a mortgagor had, before the passing of the Conveyancing Act, any right whatever in regard of the title-deeds in the possession of a mortgagee, legal or equitable, save to redeem them. He certainly had no right to see them. This is not suggestive of an implied covenant on the part of the mortgagor to take reasonable care of them. Since the Conveyancing Act the mortgagee has a right to inspect the deeds, in the condition in which they are, and to obtain copies for conveyancing purposes. When the time of redemption arrives, if it ever does, the loss caused by the default of the mortgagee in restoring the deeds can be set off in reduction of the amount due on the mortgage. In the present case it is suggested that the defendants could have counterclaimed. Leaving out of consideration the circumstance that Nugent and Gilligan have obtained a joint judgment, and treating the case as one between mortgagor and mortgagee, the counterclaim would be an action to raise the amount due on the mortgage, treating it as a debt recoverable at common law. With regard to such a proceeding the following remarks of Lord Macnaghten, in the judgment from which I have already quoted, appear to be in point:—"A Court of Equity can take all the circumstances of the case into consideration, and do complete justice between the parties, however complicated their relations may be. That is not within the province or power of a jury" at p. 283. These observations, which were applied to a supposed breach of contract by the non-acceptance of a tender, appear to be equally applicable to the obligation which is sought to be implied in the present case.

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For these reasons I am of opinion that the defendants are bound on receipt of principal, interest, and costs, to hand over the title-deeds to their mortgagor, and if they cannot hand them over in their entirety, to account for their loss or destruction, but that they are under no present liability for their safe keeping, enforceable by action at law. On this ground I think that judgment should be entered for the defendants. I express no opinion on any of the other questions which have been discussed in this case.

MURPHY, J.:—

I concur in the judgment delivered by Mr. Justice Madden.

BOYD, J.:—

I likewise agree in the judgment of Mr. Justice Madden. He has so fully and adequately expressed the views which I entertain, that I do not consider it necessary to add anything.

BARTON, J.:—

The admitted facts of this case are as follows:—

The plaintiff, Philip Gilligan, was possessed of a certain licensed house and premises in Middle Abbey-street, Dublin, valued by the witnesses at a minimum value of £4000, and a maximum value of £6300. On the occasion of his marriage these premises had been charged with £500, secured by a term of years of which the plaintiff Nugent is trustee. Afterwards the plaintiff Gilligan deposited the title-deeds and other documents of title of these premises with the defendants, the National Bank, by way of equitable mortgage to secure the repayment of a loan of £1700. The defendants, the National Bank, accordingly are the first mortgagees of these premises. Secondly, he mortgaged the premises subject to the Bank's prior mortgage, to the Dolphin Hotel Company for £788 10*s*. Thirdly, subject to the prior mortgages, he mortgaged the premises to the plaintiff Nugent for £3031. Accordingly, when the alleged cause of action arose, the premises were charged to the total amount of £6000, which left for the plaintiff Gilligan at the higher valuation of his premises,

an interest in them worth not more than £300. In March, 1900, the plaintiff Gilligan wished to sell his interest in the equity of redemption, and for the purpose of framing conditions of sale, his solicitor, Mr. O'Connell, by leave of the Bank and giving an undertaking for safe keeping and return, was handed the title-deeds and other documents, and discovered that some of them were seriously damaged, and rendered useless, as the result of a flood of the defendants' basement, which had occurred in the previous August, 1899. The plaintiffs, thereupon, without proceeding with the sale or incurring any further expense, except, perhaps, a few solicitor's letters, and without repaying, or even proposing to repay, principal, interest, and costs, commenced the present action. At the trial the jury found that the title-deeds had been damaged by the defendants' negligence, and returned a verdict for £350.

The plaintiff Nugent is stated in the statement of claim to have been a joint depositor of these deeds, but this was not proved, and his name hardly occurs in the evidence. Mr. Ronan, in his argument here, threw Nugent overboard, and did not rely on any rights which he might possess as trustee of the term of years in Gilligan's marriage settlement, or as tail incumbrancer, and the whole trial and argument proceeded on the basis that Gilligan was the only real plaintiff, and that the addition of Nugent as plaintiff was merely by way of precaution, so that all interests might be represented, and did not affect either the merits or legal bearings of the case. In fact Mr. Ronan presented the case to us on behalf of the plaintiffs as depending only on the respective rights and duties of Gilligan and the Bank, arising from an implied contract between them, and I shall therefore leave Nugent altogether out of consideration.

In my opinion, however harsh the result may appear at first sight, this action is wholly unsustainable. The grounds of my judgment are of the simplest possible character. The defendants as mortgagees of these premises were, in the eye of the law, absolute owners of them, and incidentally absolute owners of the title-deeds, subject only to the condition for reconveyance on repayment. The legal ownership had gone out of the plaintiff. Accordingly the plaintiff cannot maintain an action at law against

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the defendants for negligence in the care of what in the eye of the law was defendants' own property.

It does not follow that the plaintiff is without his remedy, but his remedy, if any, is by way of equitable relief. It is not necessary for me to define what exactly the relief would be. I do not think that such relief would necessarily be confined to remedy by injunction. Equity regards a mortgagee as a trustee of the equity of redemption for the mortgagor. I can imagine circumstances in which a mortgagor whose title-deeds had been destroyed, might be considered entitled before redemption to have his evidence of title supplied, and his title secured, and his equity of redemption protected. I express no opinion on this. It is not for me to express any opinion on that subject. At all events the remedy, if any, for such apprehended dangers could only be recognised by the eye of equity, and could only be afforded by equitable relief. Such relief, if obtainable at all, could be given in any division of the High Court since the Judicature Act, but there is nothing in the Judicature Act which, in my opinion, enables a person, who is in the eye of the law absolute owner of certain property, to be sued for negligent storage of it by the person who has in the eye of the law divested himself of the legal ownership of the property.

I might stop here, but the case is so important to the parties, to owners of property, and to bankers, that I have felt bound to examine carefully all the views submitted to us in the logical and masterly argument of Mr. Ronan. Mr. Ronan based his argument on the proposition that the relation of mortgagor and mortgagee involves not only an implied contract that on repayment the title-deeds shall be given up, but also an implied contract, enforceable before repayment, that in the meantime the mortgagee shall take due care of them. Curiously enough, these are almost the words which Blackburn, J., in *Donald* v. *Suckling* (1), applied to the contract of pledge. That was a case of a pledge of debentures. "In general," he says, "all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due

(1) L. R. 1 Q. B. at p. 615.

care being taken for its safe custody." Mr. Ronan's argument proceeded on the basis that this was a case of a pledge or pawn. If this had been a case of a pledge of documents, this action might perhaps have been maintainable. There is authority for the proposition that an action would lie in a case of pawn or pledge before redemption for breach of contract or tort. But as this was not a case of a pledge but of a mortgage, the whole edifice of Mr. Ronan's argument falls to the ground. The bailment of pledge is commonly resorted to with bankers in the case of bonds, debentures, and railway shares. Such securities are frequently deposited with a bank as security for advances. The transaction resembles an equitable mortgage by deposit of title-deeds, because it involves a deposit of documents. But it is, in its legal meaning and effect, wholly different from an equitable mortgage by deposit of title-deeds. However elementary this may be, I must make it clear by authority, because, in my opinion, it lies at the root of this case. If this had been a pledge of shares, or bonds, or debentures, or other documents to secure a debt, I would agree that the defendants were bailees, bound to take ordinary care. This, however, was not a mere pledge of documents to secure a debt, but a wholly different transaction, namely an equitable mortgage by deposit of title-deeds, which in my opinion puts the legal estate of the property, and incidentally and inseparably of the title-deeds, absolutely in the mortgagee, and does not involve or include any pawn of the deeds.

In the first place let me just state the general proposition as given in Smith's Leading Cases, in the notes, vol. i., p. 192 :— "From all this it will be seen that a pawn differs on the one hand from a lien which . . . passes no property . . . and on the other hand from a mortgage which conveys the entire property in the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee . . . whereas a pawn never conveys the general property to the pawnee, but only a special property in the thing pawned." Next let me cite three cases which illustrate, I think, the following propositions, that an equitable mortgage in relation to the title-deeds carries with it all the remedies incident to a legal mortgage, that it involves no pawn or bailment

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of the title-deeds, and that the title-deeds are in an equitable mortgage, just as inseparable from the title to the mortgaged premises, as in the case of a legal mortgage. These cases are *Carter* v. *Wake* (1); *In re Richardson, Shillito* v. *Hobson* (2); and *Bank of New South Wales* v. *O'Connor* (3).

In *Carter* v. *Wake* (1) the defendant had deposited certain Canada Railway bonds with the plaintiff as security for a debt, and the plaintiff in the suit claimed, *inter alia*, a foreclosure of the equity of redemption in these bonds. Jessel, M.R., held that the plaintiff was not an equitable mortgagee but a mere pledgee of the bonds to secure a debt, and was therefore not entitled to foreclosure. A few sentences from his judgment illustrate the point which I am trying to make clear, namely that the defendants in this case of *Gilligan* v. *National Bank* were in the position of absolute owners dealing with their own property, and not in the position of a bailee. Jessel, M.R., at page 606, said:—"The plaintiff is in the position of a mere pledgee at law of certain chattels, and I do not think that a person in that position has the same right of foreclosure as a mortgagee by the deposit of title-deeds of land. . . . when there is a deposit of title-deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title." In other words, applying that case to this, the National Bank have all the remedies incident to a legal mortgage, and differ from a pledgee in being absolute owners instead of mere bailees.

In the case of *In re Richardson; Shillito* v. *Hobson* (2), an equitable mortgagee by deposit of a title-deed had purported to dispose of his interest in the title-deed by a parol voluntary gift, and it was argued on behalf of his donee that the mortgagee was entitled to deal with the deed apart from the land as if it was a bailed chattel. The Court of Appeal held that he could not do so, because his interest in the title-deed was only incidental to his

(1) 4 Ch. D. 605. (2) 30 Ch. D. 396. (3) 14 A. C. 273.

interest in the land. I refer to the case for the purpose of citing the words of Fry, L.J., at p. 403, because they serve to illustrate the difference between a bailment of bonds or deeds and an equitable deposit of title-deeds. Fry, L.J., p. 403, said—"The question then is this. Is there incident to every equitable mortgage by deposit a pawn of the deeds deposited, or are the deeds handed over merely as incident to, and as inseparable from, the equitable charge?" And he answers that question thus on the same page: "I conclude that upon a mere equitable mortgage by deposit there is no pawn of the deeds, but that the deeds are held by the equitable mortgagee merely as incident to the charge on the land."

In *The Bank of New South Wales* v. *O'Connor* (1) the same distinction is clearly explained by Lord Macnaghten who delivered the judgment of their Lordships. In that case an equitable mortgagor brought an action of detinue against the mortgagee to recover the title-deeds, alleging that he had tendered the amount due, and that by the refusal of the defendant to deliver the deeds he had been unable to procure a loan and had suffered other damage. The case was argued and treated by all the Courts as raising no question except as to the measure of damages. But the Privy Council brushed this question aside, and held that such an action could not be maintained prior to repayment. That was a case of detinue, and this is a case of negligence. But I refer to the case in order to cite the language of Lord Macnaghten which, it seems to me, bears directly on the present case, and, by the principles which it makes clear, leaves no loophole for argument that a plaintiff can maintain an action like the present action of *Gilligan* v. *National Bank*. At page 282 Lord Macnaghten says:—"The question that suggests itself is, can such an action as this be maintained? It was treated by the learned counsel for the respondent, and indeed by the learned counsel for the appellants during a great part of the argument, as an action for damages occasioned by a wrongful act arising out of breach of contract? What is the wrongful act? and what is the breach of contract?" He then points out that the Judge at the trial treated it, as the Judge has

(1) 14 A. C. 273.

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in this case, as a case of bailment, and he proceeds:—"The proposition seems founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem must do equity and pay principal, interest, and costs before he can recover the property which at law is not his." I think it is equally clear that an equitable mortgagor cannot come into Court and before repayment maintain against the mortgagee an action for negligently storing property which at law is not his.

There is one other case which deserves to be cited, because it is the nearest approach to the present case that I have been able to find. I am not aware of any case in which a mortgagor has attempted to bring an action like this. But in 1864 a *puisne* mortgagee of personal chattels brought an action against the first mortgagee for misconducting a sale of the mortgaged chattels: *Maughan* v. *Sharpe* (1). There happened in that case to be a covenant in the mortgage under which the mortgagee could be made responsible to the mortgagor for any misconduct in the exercise of the power of sale, and the effect of the decision seems to be that, in the absence of such a covenant, no such action could be maintained. The Court ruled that the mortgagee of personal property (as of real property) was absolute owner of the property, and no action-at-law in the absence of express covenant would lie against him for wrongful dealing with it, and that the remedy (if any) must be in equity either by injunction or for breach of trust. Williams, J., after pointing out at p. 464 that the case was concerned with a mortgage and not with a pledge of personal chattels, proceeds:—"The property is absolutely and indefeasibly vested in the grantee, if the condition be not performed; and a Court of law can look at no other than the mortgagee or grantee. When, therefore, Dolly (the mortgagor) professes to assign these goods to the plaintiff, he has nothing to assign; the property was out of him. That being so, the plaintiff can have no right to

(1) 17 C. B. (N. S.) 443.

complain of the manner in which the absolute owners thought fit to deal with the property." He then points out that in this particular case there was a covenant with the mortgagor to conduct the sale properly, which "possibly" the mortgagor or somebody suing in his name might have enforced, and he concludes as follows:—"Or, it may be that, if recourse were had to a Court of Equity, the Court would hold the mortgagees to be trustees in favour of the mortgagor or those to whom he has transferred his rights, and would give them a remedy for any abuse by them of their trust. We, however, can only look at such rights as the suitors have by law. We can, therefore, only regard the defendants as absolute owners of the goods in question, and, consequently, no action will lie against them at the suit of the plaintiff for dealing with them as they did."

Now I have done with this branch of the case, and these authorities lead me to conclude, I think, that both before and since the Judicature Act, a mortgagee, legal or equitable, being in the eye of law the absolute owner of the mortgaged property, cannot, at all events before repayment, be made responsible in an action at law, in the absence of an express covenant, for negligence in dealing with what in the eye of the law is his own property, and I think they also make it plain, that the mortgagor has no substantial grievance, because equity will sooner or later protect his equitable interest, if he can show himself to be entitled to equitable relief.

There is another branch of Mr. Ronan's argument which deserves an answer, before that argument can be rejected. Mr. Ronan relied on a class of cases, of which *Brown* v. *Sewell* (1) was the one most frequently referred to, in which the Courts of Equity have in foreclosure and redemption suits decreed indemnity, and in some cases compensation in respect of lost title-deeds. He argued with great force that in these cases the Courts were giving effect to an implied contract on the part of the mortgagee, not merely to return the deeds in the event of redemption, but to take care of them while in possession of them before redemption. Mr. Matheson, on the other hand, accounted for these cases as examples

(1) 11 Ha. 49.

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of the interference of equity in case of wilful default, and relied on a passage in a modern text-book to that effect. I have tried to trace back these cases to their fountain head, and I think that neither of these explanations is the true one. The real explanation is, I think, much simpler, and is to be found in the ancient jurisdiction exercised by Courts of Equity under the head of "Accident," one of the commonest examples of which was their interference in the case of lost deeds and bonds. This interference was founded partly on the "intolerable grievances caused by the rigour of common law," which in some cases did not permit any evidence to be given of lost bonds and deeds without "*profert in curiâ*," and which, in another class of cases, held executors and administrators in the words of Story's Equity Jurisprudence (paragraph 90) liable for inevitable accident, fire, or robbery, and in the case of mortgagees similarly threw upon them an absolute liability for the return of deeds which nothing could excuse. Accordingly, equity extended to them the excuse available to ordinary bailees and agents in cases of loss without negligence, and afterwards adapted their remedies so as to give compensation in case of negligence. Another ground of this jurisdiction was the ability and willingness of equity to grant elastic remedies (such as indemnity, ordering money into Court, accounts and inquiries), which were not obtainable at law. When this doctrine came to be applied to the case of mortgage deeds, Courts of Equity had this additional hold over the mortgagee that they regarded him until reconveyance as the trustee of the equity of redemption for the mortgagor, and after reconveyance as trustee of the title-deeds. In order to make my meaning more clear I shall trace this doctrine from its source, and I do not think the time will be wasted, because any contribution to a true understanding of the group of cases, of which *Brown* v. *Sewell* (1) was only a comparatively modern example, must help to solve the questions raised by this case of *Gilligan* v. *National Bank*.

Let me mention in the first instance three cases *tempore* Hardwicke, which illustrate this doctrine in its earlier stages, before as far as I know it was ever applied to mortgage deeds.

(1) 11 Ha. 49.

In *Anon* (1), decided by Lord Hardwicke in 1741, the Lord Chancellor laid it down that where a deed happens to be lost, "you cannot at law read a copy, because you must declare with a *profert hic in curiâ*, and therefore you may bring a bill here (*i.e.* in equity) to relieve against the accident of the original being lost." Here was an example of equity interfering in the case of a lost deed to mitigate the rigour of the common law. Next I come to a case where Lord Hardwicke pointed out the way in which equity interfered to give remedies such as indemnity, which could not be given at common law. I refer to a passage in *Walmsley* v. *Child* [1749] (2). The Lord Chancellor points out "another case in which you may come into this Court on a loss (*i.e.* of a bond or deed) is to pray satisfaction and payment of it upon terms of giving security. In an action at law, the plaintiff might offer, but the defendant could not be compelled to take security, but in equity that would be a consideration whether they are reasonable." I refer next to a case which was cited in this argument. It was in the list read by Mr. Campbell. It was *Jones* v. *Lewis* [1750–51] (3). In that case an administratrix had left chattels (presumably deeds) with her solicitor to be delivered to the party entitled. The articles were stolen from the solicitor. She was held by Lord Hardwicke to have done with the chattels what she would have done with her own, which was the measure of the liability of "a bailee executor, administrator, or trustee," and not to be chargeable for the loss, because in the words of the marginal note, she would not have been liable if they had remained in her own possession "till the accident." This case is usually referred to in the same category as the cases of lost mortgage deeds. But it does not rest upon an implied contract or upon the doctrine of wilful waste, but as pointed out in Williams on Executors, 8th ed., vol. 2, pp. 1814, 1815, upon the lenity of equity interfering to mitigate the rigour of the common law doctrine, which was, as laid down many years afterwards in *Crosse* v. *Smith* (4), that an executor was not in the position of a bailee, and could not excuse himself even on the score of inevitable accident, fire, robbery, or

(1) 2 Atk. p. 61.
(2) Ves. Sen. 341 at p. 344.
(3) 2 Ves. Sen. 240.
(4) 7 East, 246 at p. 258.

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the like. Accordingly this doctrine of "Accident" as applied to lost deeds and other documents was well established at the end of the last century. Lord Redesdale in the second edition of his treatise on Chancery Practice, published in 1789 (Mitford on Chancery Practice), gives this doctrine under the head of "Accident," but as yet no case of mortgage deeds is referred to. The first case of the doctrine of Accident being applied to a mortgage deed was, I think, the Irish case of *Schoole and Wife* v. *Sall* (1), decided by Lord Redesdale in 1803. It was a redemption suit. In that case the mortgagee's administratrix had lodged the title-deeds with her solicitor, whose representative claimed a lien and refused to relinquish them. For this reason the mortgagee was unable to reconvey, but he was proceeding for his collateral legal remedy by an action at law on his bond, which at law he was entitled to do. Lord Redesdale ordered the proceedings at law on the bond to be stayed, but on the other hand he decreed accounts and payment into Court of the mortgage money, there to remain until the mortgagee should be in a position to produce the title-deeds, and reconvey. The next cases are the cases on which *Brown* v. *Sewell* (2), and all the other more modern cases are based, viz. *Smith* v. *Bicknell* (1805–1810), and *Stokoe* v. *Robson* (1814) (both reported in 3 Vesey and Beames, p. 51, the former case being reported in a note to the latter), and a few years later *Shelmardine* v. *Harrop* (3). The reporter of the latter case in a note gives the form (not to be found elsewhere) of the plenary decree in the case of *Stokoe* v. *Robson*. They were all cases of redemption or foreclosure suits, in which title-deeds had been stolen from the mortgagee. I need not recapitulate the facts of all these cases, but I propose to cite from the 2nd ed. of Maddock's Chancery Practice, published in 1820, the way in which they were regarded by that old lawyer who from 1815 to 1822 was the reporter in the Vice-Chancellor's Court, and who himself reported the case of *Shelmardine* v. *Harrop* (3). In vol. i., chap. 1, he deals with the subject of Accident. Let me cite a few of the opening sentences of that chapter:—"The jurisdiction of

(1) 1 Sch. & Lef. 176. (2) 11 Ha. 49. (3) 6 Madd. 39.

the Chancellor in cases of accidents has been long established; they appear to have been relieved against in the reign of Henry VII."; and "now certainly they form an acknowledged branch of equity relief." And then he proceeds to give this first example of this kind of equity relief:—"Where an instrument on which title is founded is lost, a Court of Equity will interfere to supply the defect occasioned by such accident. As where a mortgagee had the mortgage deeds stolen from him: on a bill to foreclose, the defendant proposing to redeem, an account was directed, and an inquiry what was become of the title-deeds, and on its appearing by the Master's report that the mortgage deed could not be found, the plaintiff was directed to pay the costs of the suit, execute a reconveyance, and give an indemnity; and in consequence an indemnity bond was afterwards given by the mortgagee"; and he refers for his authority in the cases of *Stokoe* v. *Robson* and *Shelmardine* v. *Harrop* (1), to which I have already referred. Maddock then proceeds to deal with cases of lost bonds and other instruments. A few years later, in 1827, appeared the 4th edition of Lord Redesdale's treatise. The old passage, describing the old doctrine of Accident, is the same as in 1789. But now are added, at p. 135, as illustrations of the doctrine, a reference to the cases of the lost mortgage deeds: *Stokoe* v. *Robson*, and *Smith* v. *Bicknell*. The passage is as follows:—"Cases frequently occur in which the principles by which the ordinary Courts are guided in their administration of justice give a right; but from accident or fraud, or defect in their mode of proceeding, these Courts can afford no remedy, or cannot give the most complete remedy; and sometimes the effect of the remedy attempted to be given by a Court of ordinary jurisdiction is defeated by fraud or accident. In such cases Courts of Equity will interpose to give those remedies which the ordinary Courts would give, if their powers were equal to the purpose, or their mode of administering justice could reach the evil, and also to enforce remedies attempted to be given by those Courts when their effect is so defeated. Thus when an instrument on which a title is founded, as a bond, is lost, the Courts of common law

(1) 6 Madd. 39.

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affording no remedy, a Court of Equity will interfere to supply the defect occasioned by the accident, and will give the same remedy which a Court of common law would have given if the accident had not happened. If an instrument has been destroyed or is fraudulently suppressed, or withheld from the party claiming under it, Courts of Equity will also give relief; as they will generally lend their aid wherever by fraud or accident a person is prevented from effectually asserting in the Courts of ordinary jurisdiction rights founded on principles acknowledged by those Courts." In the note these cases of *Smith* v. *Bicknell* and *Stokoe* v. *Robson* are referred to as examples of this jurisdiction. The next case is about thirty years later, namely *Lord Middleton* v. *Eliot* (1). In that case *Stokoe* v. *Robson*, *Smith* v. *Bicknell* and *Shelmardine* v. *Harrop* (2) were cited; and the Vice-Chancellor based part of his order on the two former cases. Then in 1848 came the case of *Hornby* v. *Matcham* (3) which was, I think, the first case in which compensation was granted on the ground that the deeds had been destroyed by the mortgagee, not stolen from him. Then in the year 1850 came the case of *Brown* v. *Sewell* (4) in the Vice-Chancellor's Court. In that case *Jones* v. *Lewis*, *Stokoe* v. *Robson*, *Smith* v. *Bicknell*, *Hornby* v. *Matcham*, and the passage which I have cited from Maddock's Chancery Practice were all referred to in argument, and these cases are referred to in the judgment of the Judge. The judgment must be read in the light of the authorities on which it was founded. He did not mention the doctrine of Accident. But from the authorities mentioned it was plain that the case depended on that doctrine, not on an implied contract or on wilful default. The only remaining case which I know of was *James* v. *Rumsey* (5), to which, as far as the origin of this jurisdiction is concerned, the same observations apply. Finally, I find that in Story's Equity Jurisprudence, *Stokoe* v. *Robson*, *Smith* v. *Bicknell*, and other of the older cases to which I have referred are cited as examples of the application of the doctrine of accident to lost deeds.

(1) [1841] 15 Sim. 531.
(2) 6 Madd. 39.
(3) 16 Sim. 325.
(4) 11 Ha. 49.
(5) 11 Ch. D. 398.

Accordingly these cases, in some of which Courts of Equity have in redemption or foreclosure suits decreed indemnity or compensation to a mortgagor in respect of title-deeds which have been lost by the mortgagee, seem to be referable to the old Equitable doctrine of Accident, and cannot be accounted for by the hypothesis of an implied contract such as was contended for by Mr. Ronan.

However, this has been a digression on my part not necessary for the decision of this case—a digression into which I have been led by Mr. Ronan, who strongly relied upon *Brown* v. *Sewell* (1) and that class of case as authorities for the plaintiff here. I can only conclude my judgment as I commenced it by saying that the grounds of my opinion are very simple ones. This is not a case of pledgor and pledgee, but of mortgagor and mortgagee. In my opinion an action for damages for negligence in storing title-deeds does not, at all events before repayment, lie at the suit of a mortgagor against an equitable mortgagee by deposit of title-deeds, because the mortgagee is not a pawnee or bailee of the documents, but the absolute owner of them in the eye of the law; and the mortgagor's remedy, if any, is not by an action for damages, but by an application for equitable relief.

Solicitors for the plaintiffs: *O'Connell & Son.*
Solicitor for the National Bank: *W. H. Dunne.*

J. L.

(1) 11 Ha. 49.

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April 30, May 1, 2, 8, 14.

REG. (DROHAN) *v.* CHAIRMAN AND JUSTICES OF COUNTY WATERFORD (1).

*Summary jurisdiction—Appeal to Quarter Sessions—Recognisance to prosecute appeal—Validity of recognisance signed only by some of several appellants—Validity of recognisance signed only by an appellant's agent—Waiver—*14 & 15 *Vict. c.* 93, *s.* 24*—Effect of reversal on appeal of a joint conviction against three defendants, two of whom only had validly appealed—Bias*—Certiorari—Certiorari *in regard to an order of acquittal by an inferior tribunal.*

D. and two others having been jointly convicted at Petty Sessions, under the Fishery Laws, for not maintaining a free gap in the Lismore salmon weir, appealed jointly to Quarter Sessions, and, after adjournments by consent, the case was heard and the conviction below reversed. The two other appellants had duly perfected the necessary recognisances, but D., owing to absence from the country, had been unable personally to sign the recognisance within the time limited by 14 & 15 Vict. c. 93, s. 24, but his agent thereto authorised had done so on his behalf. On an application for *certiorari* to quash the order of Quarter Sessions:—

Held, that the application must fail.

Semble, that D.'s recognisance was bad, but that, even if bad, this objection could not, in this case, be now taken, inasmuch as it had not been relied upon when the appeal had first come before the Quarter Sessions, and had not been relied upon on a previous unsuccessful application to the High Court for a writ of prohibition to restrain the hearing of the appeal.

Held, further, that, on the reversal on appeal by a Court of Quarter Sessions of a joint conviction against several defendants, the conviction as against all of them must fall, even though one of such appellants had not validly entered into the required recognisance to prosecute the appeal.

Quære, Does *certiorari* in no case lie from an order of acquittal by Justices? *Reg.* v. *Justices of Antrim* ([1895] 2 Ir. R. 603) discussed.

An objection to an adjudication by a Justice on the ground of bias must be supported by evidence to show some reasonable likelihood of bias.

CERTIORARI. Motion to make absolute a conditional order, dated the 23rd February, 1900, for a writ of *certiorari*, directed to the Chairman and Justices of county Waterford, to remove and quash an order made by them at Quarter Sessions on the 30th

(1) Before SIR P. O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

December, 1899, upon the hearing of an appeal from an order of the Justices sitting at Lismore Petty Sessions on the 29th July, 1899, convicting the defendants, "for that the free gap in defendants' weir at Lismore was not in accordance with the regulations of the Salmon Fishery (Ireland) Act, 1862, sect. 9, sub-sect. 2, and fining them £54." The order of the Justices at Petty Sessions had been reversed on appeal at Quarter Sessions, and the summons dismissed.

The grounds stated upon the face of the conditional order were—1, want and excess of jurisdiction; 2, that one of the adjudicating Justices was interested and partial; 3, that no valid recognisance or recognisances had been entered into, and that there was no power to hear the case without valid recognisances, and that the entry into an illegal recognisance after the hearing of the case, and after the termination of the Quarter Sessions, could not supply this defect; and, 4, that evidence proper to be submitted on the hearing of the appeal was, having regard to the charges laid in the summons, illegally excluded, and that the complainant was entitled to a rehearing of the charge laid in the summons.

The Duke of Devonshire, and Richard Foley and Edmond Foley (the lessees of his salmon weir at Lismore), had been prosecuted at Lismore Petty Sessions (*a*) for not making, and (*b*) for not maintaining, a legal free gap in that weir, and had been convicted by the Justices on the 28th January, 1899, upon the first count, and had been fined £1000.

On case stated for the opinion of the Queen's Bench Division, the Court, after argument, made an order, dated the 19th June, 1899, declaring that the conviction for *not making* a free gap was wrong and should be reversed; but they remitted the case to the Justices, with an expression of opinion that, by reason of a certain finding of fact in regard to the non-maintenance of the gap, the Justices ought to convict the defendants for not having *maintained* it, and should impose in respect thereof such penalty as was right. Thereupon, on the 29th July, 1899, the Justices sitting at Lismore Petty Sessions made a new order of conviction, imposing on the three defendants a penalty of £54. The defendants having thereupon proceeded to appeal to the Court of Quarter Sessions, the prosecutor, Drohan, on the 13th September,

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obtained a conditional order for a writ of prohibition, directed to the Chairman and Justices of Quarter Sessions, to restrain them from entertaining the appeal on the ground (substantially) that the order of the Queen's Bench Division upon the case stated was final, and that therefore no appeal lay. The Court of Quarter Sessions subsequently met on the 20th September, 1899, and, by consent of the parties, made an order adjourning the matter pend- the decision of the Queen's Bench Division whether prohibition should go.

On the 3rd November, 1899, the Queen's Bench Division, after argument, discharged the conditional order for prohibition, holding, by a majority, that the acceptance by the defendants of a case stated as to the conviction of January, 1899, did not, under the circumstances of the case, preclude them from appealing to Quarter Sessions from the subsequent order of 29th July.

See the reports of these proceedings—[1900] 2 Ir. R. 161; [1900] 2 Ir. R. 307.

It appeared from the records of the Quarter Sessions Court (produced during the argument) that when the appeal came on for hearing on the 20th September, an order was made by that Court that the appeal was "adjourned by consent," and, upon a subsequent occasion, a similar order, adjourning the appeal by consent, was made.

The conditional order for prohibition having been discharged, the appeal was heard upon the merits on the 30th December, 1899, before his Honour the County Court Judge and Mr. John Noonan, J.P. Counsel for the prosecutor (Drohan) objected to Mr. Noonan, on the ground of interest, alleging that he was a party to ordering the prosecution, and had been present at the meeting of the conservators when directions were given for the institution of proceedings in regard to this weir, and on the ground that he was a tenant of the defendants Foley, and was connected by marriage with one of them. As to this, Mr. Noonan said that he took no part in any of the discussions referred to, and was never present at any meeting of the board when the prosecution against the defendants, or either of them, was either considered or decided upon; that, the meetings of the board being sometimes protracted, and the names of the members who attended being taken down without regard to the stage of proceedings when they

entered or left the room, the fact that his name appeared in the minute book as present when Mr. Drohan was directed to prosecute the defendants did not necessarily show that he, Mr. Noonan, was present when the resolution in question was proposed or adopted; and he positively swore that he was not present at the time, and did not know of the existence of the resolution or direction until after the summons against the defendants had been taken out. In reply to a statement made on behalf of Drohan, Mr. Noonan admitted that on two previous occasions when prosecutions were at hearing against the defendants on the 3rd and 17th December, 1898, when the summons herein first came on for hearing, he had withdrawn from the bench, being then a member of the Board of Conservators, and believing that, while holding that position, it would not be seemly for him to adjudicate upon such a complaint; but that long before the appeal to Quarter Sessions came on to be heard, his connexion with the board had been severed. He stated that he had sat on the appeal without communication with anybody, and that when the objection was raised he had stated that he had never authorised the prosecution, and was quite impartial between the parties.

Counsel for Drohan next objected (at Quarter Sessions) that the appeal was not properly before the Court, because, although the proper recognisances had been entered into formally by Messrs. Richard and Edmund Foley, the recognisance entered into by the Duke of Devonshire was not signed personally by him, but by his acting agent at Lismore, Mr. Beecher. Mr. Beecher (it was stated) had signed the recognisance on the Duke's behalf, under written authority to do so, it being impossible to get the Duke's own signature within the time limited by the Petty Sessions Act; and it was stated that at Quarter Sessions the Chairman considered the recognisance defective so far as concerned the Duke, but ruled that he would proceed to hear the appeal, and allow a valid recognisance to be lodged within a week; and (it was stated) counsel for the Duke undertook that a valid recognisance would be lodged *nunc pro tunc* within that time, and that this was done.

As to this, it was submitted in the affidavits filed on behalf of the three respondents, the Duke of Devonshire and the Messrs. Foley, that the conditional order for prohibition was obtained on the faith of the representation, made in the affidavit grounding the

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application for that order, that the appeal to Quarter Sessions had been duly lodged; and stated further, that, upon the argument of the motion to make that conditional order absolute, counsel for the prosecutor, Drohan, in reply to the defendants' contention that the application for prohibition was premature, inasmuch as the appeal had not been entered upon by the Court of Quarter Sessions, had urged that the order of adjournment made on the 20th September conclusively proved that the appeal had not only been lodged, but had also been entered upon; and that the objection, that the appeal had not been lodged, was for the first time taken on the 30th December, 1899, when the appeal finally came on for hearing on the merits.

The appeal having been heard on the merits, his Honour (the Chairman) and Mr. Noonan, J.P., after a brief consultation, reversed the conviction below, and dismissed the complaint.

The fourth objection taken to the order of Quarter Sessions, viz. that evidence had been illegally excluded, was abandoned at the argument.

Healy, Q.C., and *T. Sullivan*, for the prosecutor.

D. B. Sullivan, Q.C., and *Sandford*, for the respondents.

The arguments of counsel appear sufficiently from the judgments of the Court.

Cur. adv. vult.

May 14.

SIR PETER O'BRIEN, L.C.J.:—

This case as originally presented appeared to involve the determination of questions of very considerable moment in the administration of the law, but resolved itself in the later stages of the argument into somewhat simpler issues. It is sought to quash an order of acquittal which was made at the Lismore Quarter Sessions by the learned County Court Judge of Waterford and by Mr. Noonan, a Justice of the Peace who sat with him. It appears that His Grace the Duke of Devonshire, the owner of the Lismore Weir, and two gentlemen, named Foley, who were lessees of the weir, having been convicted at Petty Sessions for not maintaining the weir pursuant to statutable requirements, sought to challenge the propriety of the conviction by appeal to the Quarter Sessions. There already had been a case stated to this Court, under the Case Stated Act, with reference to the same prosecution. The summons

which had initiated the prosecution contained two charges, one complaining that a proper free gap had not been constructed in the said weir; and the other that a free gap had not been properly maintained. The magistrates convicted on the first charge; but this Court held that, upon the facts stated, a conviction on the first charge could not be upheld; but, having regard to a certain finding of fact which appeared in the case stated to have been arrived at by the magistrates, the case was sent back to them with a direction to convict on the second charge for not properly maintaining the weir. When the case was remitted to the magistrates, they convicted the defendants accordingly.

When the defendants proceeded to appeal to Quarter Sessions, the prosecutor, Mr. Drohan, applied to this Court for a prohibition to prevent them so doing, on the ground that the proceeding by case stated had deprived them of all right to appeal. The application for the prohibition was held to be untenable, and the case came on to be heard on appeal. The formal records of the Quarter Sessions Court, which have been before us, show that, before the appeal came on to be heard on the merits, it had been adjourned by the consent of the parties. Indeed it had been adjourned by consent on several occasions. The orders of the Court were formally drawn up, and we have them before us. I do not stop to examine the cause of or necessity for the adjournments. The records of the orders of adjournment are produced. They state no reasons. They are simply orders of adjournment by consent. When the case came subsequently to be heard, Mr. Healy, Q.C., submitted that there was no appeal before the Court; that it could not be entered upon at all, inasmuch as the recognisance of appeal was, as he alleged, defective. The ground of impeachment was that the Duke of Devonshire had not personally signed the recognisance, though his agent had by his written authority appended his name to it. It was admitted that the recognisances of the Messrs. Foley were in every way formal and complete.

Some discussion took place on Mr. Healy's objection. It is alleged that the Chairman of Quarter Sessions said that the recognisance of the Duke was defective, but could be amended; the only orders of the Court before us, however, are the orders of adjournment and the order of adjudication of acquittal. We

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cannot regard affidavits as to verbal discussions. We are bound by the orders of the Court, and the orders of the Court show that the appeal was proceeded with and an adjudication of acquittal made. When the Court proceeded to hear the case on the merits, Mr. Healy challenged the propriety of Mr. Noonan's sitting, and emphatically objected to him on the ground that he had been a party to a resolution directing the prosecution of the defendants. Mr. Noonan did not leave the bench, but continued to sit with the Chairman, and an order of acquittal was made.

The case now comes before us for a writ of *certiorari* to quash that order of acquittal, and every possible ground that ingenuity could suggest has been put forward in impeachment of the order of the Court of Quarter Sessions. The argument developed some heat—not of an excessive character—and I must say it was interestingly and ably conducted on both sides. Mr. Healy says that the order was bad; first, because there was no proper recognisance, and that in fact the Court, owing to the defect of the recognisance, had no legal seisin of the case; secondly, that Mr. Noonan was biassed, and that therefore the Court was incompetent, and that even an order of acquittal can be quashed if bias exists. He says, thirdly, that, whatever may result in the case of the Messrs. Foley, whose recognisances were in every respect regular, the conviction of the Duke of Devonshire whose recognisance was imperfect must stand, and that though he was innocent in the opinion of the appellate tribunal, he must remain subject to the conviction and penalty, made and imposed by the inferior tribunal at Petty Sessions.

These are substantially Mr. Healy's grounds of impeachment of the order of the Court of Quarter Sessions.

Mr. Sullivan, who appeared for the defendants, addressed himself with much vigour to Mr. Healy's arguments. He contended that the objection to the recognisance was late; that an order had been antecedently made adjourning the case, and that this legally precluded Mr. Healy's first objection. He argued that when the Court made the order of adjournment they must be taken to have had seisin of the case. The preliminary condition of recognisance must be taken to have been complied with. Unless they had seisin of the case the order could not have been made, and it was, as appears by the order, at the instance of both parties that the order

of adjournment was made. If a preliminary point is to be relied upon, it must be made before the Court makes any order which implies seisin of the case, and an order of adjournment, he contended, clearly implies seisin of the case.

But Mr. Sullivan, still more vigorously, and with greater emphasis, points out what took place on the motion for a prohibition in this Court. Mr. Verlin correctly states in his affidavit what did take place. It was urged, he says, amongst other matters on behalf of the defendants, that the application for a prohibition was premature, inasmuch as the appeal had not been entered upon by the Court of Quarter Sessions; but this was strenuously opposed by the prosecutor's counsel, who insisted that the order of adjournment previously made conclusively proved that the appeal had not only been lodged but had also been entered on. This statement of Mr. Verlin's is entirely correct. My brother Gibson and I were members of the Court; and certainly, if we had known that the prosecutor's counsel had this point *in petto*, we should have been largely influenced by it—if indeed we should not have at once refused the prohibition having regard to it.

I am very clearly of opinion that under these circumstances the prosecutor has waived, and is now precluded from relying upon, any informality in the recognisance. Further, even if, so far as the Duke was concerned, the recognisance was imperfect and invalid, would this fact prevent his co-defendants, whose recognisances were duly entered into, from appealing from the order of conviction pronounced against all three jointly? As at present advised, I think not. In such a case it would be unjust that any of the parties aggrieved by the Justices' order should be debarred from questioning it on appeal, because one of his co-defendants, named in the order of conviction against all jointly, chose unreasonably to refuse to appeal, or by death, or from absence, or sickness, or mental incapacity, was unable to perfect the required recogisance and join in the appeal.

I come now to the main, to the serious and all-important, question in the case:—Was Mr. Noonan influenced by bias? What was the ground of bias relied upon? That he was one of those who had ordered the prosecution. This is the sole ground of bias alleged, as was frequently stated at the bar. I say at once that

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I am not satisfied that Mr. Noonan took any part in ordering the prosecution. Nay more, I am of opinion, on the weight of the evidence, that he did not do so; that he did not (to use Mr. Healy's phrase) act as a "bonnet" in pretending to support the resolution in order that he might afterwards acting as a magistrate endeavour to procure the acquittal of the defendants. I am of opinion that he took part in no way either in the discussion or the resolution. I shall shortly assign my reasons for the view I take. Mr. Healy, in his able and interesting argument, admitted that, independently of this case, Mr. Noonan was a man of undoubted respectability, and, on more occasions than one during the argument, Mr. Healy paid a tribute to his respectability; he was (he said) *generally* a respectable man. What then does this man, whose respectability, apart from this case, is admitted, state in his affidavit? He states on oath that he never took part in any discussion as to the proposed prosecution—that he never had anything to say to the direction or resolution of the Board of Conservators as to the prosecution; and that he only knew of the resolution after the summons was issued. In this statement there can be no possibility of mistake or mental reservation. His statement must either be true or perjured; and can we convict any respectable man of perjury upon the evidence here before us? No doubt, Col. Longfield (a member of the Board of Conservators) swears that he was present at the meeting when the direction was given. Noonan admits that he was there for a time, but not at the particular time when this matter was under discussion. It is common knowledge that these meetings sometimes occupy hours, and that the members come in and go out during their progress. A considerable interval elapsed, nearly a year, between the meeting and the issue of the summons. Colonel Longfield, whom I have the pleasure of knowing, is a gentleman, admittedly, of the highest character and unimpeachable veracity, but he well may have been mistaken; and it looks to me as if this affidavit had been submitted to him, and that, knowing that Mr. Noonan had been present at the meeting, he did not stop to consider whether the point at issue was anything else than the mere fact of Noonan's having been present there, without thinking whether he had in fact been present at this particular part of that meeting. True, Drohan swears that he was present and took part in the discussion, but Drohan may have

confounded this occasion with the previous lengthy discussion that had taken place in regard to the expert's report as to the state of the Lismore weir; and, in reference to Drohan, whose duty it was to keep the books of the board—all I can say is that the entry in the book in regard to this prosecution does not produce to my mind a very satisfactory impression. I do not like to say anything at all disparaging. The entry does not in any way purport to be a *resolution* directing proceedings to be instituted, but only a direction to carry them on. To this entry it is not requisite, and I do not wish, to refer more particularly, or to cast reflections of an unpleasant character on this gentleman. It is suggested that it differs somewhat from the entries that precede and follow it. Still, as the matter is before us, I think that, sitting here as a Judge, I am as a Judge warranted in saying that, there being this conflicting swearing, I do not regard his book as satisfactory. Further than this I do not desire to make any reflections.

There remains, however, one other matter to which I feel it necessary to refer; and to this also I must refer with regret. It is a subject on which I desire to be very explicit. It is said by Mr. Carroll, the solicitor on record for Drohan—not, perhaps, in express or categorical language, but that it is none the less conveyed and intended to be conveyed is perfectly clear—that the Duke of Devonshire appointed two magistrates to assist his cause in regard to the Lismore weir. For this suggestion, which Carroll's affidavit beyond a doubt conveys, there is not a shadow of foundation, and the suggestion was eminently improper. Two gentlemen were appointed to the Commission of the Peace by the Duke of Devonshire as Lord Lieutenant of the county—one of these gentlemen having a distinctly adverse interest, since he was proprietor of a fishery in the upper waters of the river, the other being a Justice of the county Limerick who had come to reside in the county Waterford, and to whom the commission was at once given in the ordinary course of things. It is upon such slender ground that this scandalous imputation has been made, and I feel justified in saying that the solicitor who prepared the affidavits for the other witnesses to swear, and himself swears in his own affidavit to the presence of Mr. Noonan, was acting in, to say the least of it, an intemperate manner; and, looking at the whole case, I repeat that I am not satisfied that Mr. Noonan was affected by

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bias; and further, I may say that, on the balance of the evidence, I am satisfied that his conduct was throughout free from taint.

This disposes of the case. The appeal was properly before the Quarter Sessions. The Court made an order of acquittal. The allegation of bias fails, and the conditional order for *certiorari* must be discharged.

It becomes, therefore, unnecessary to decide whether, even assuming every allegation of the applicant to have been proved, *certiorari* could issue to remove and quash the order of acquittal. I entirely adhere to the views expressed in my judgment in *Reg.* v. *Justices of County Antrim* (1), and to what I said there—that, if an order of conviction by an otherwise competent Court were set aside for bias, a defendant could not again be put on trial, because the conviction was voidable, not void. The Justices would have had *ex hypothesi* jurisdiction to try the case and to convict. But, in regard to an order of acquittal, it appears (as I there stated), that in the centuries of our law no instance can be found where an order of acquittal by an authorized tribunal has been quashed on the ground of bias. I pointed out, however, that "if the case were one where the tribunal was *ex facie* wholly unauthorized and the accusation and the accused plainly *coram non judice*, the matter would be entirely different." In the *Antrim Case* (1) Lord Justice Holmes did not decide the point, and very rightly. I had expressed my opinion; my brother the late Mr. Justice O'Brien had gone still further; and Lord Justice Holmes, having regard to some sweeping expressions of my lamented brother O'Brien, desired to guard himself from assenting to those views. In *Reg.* (*Blakeney*) v. *Justices of County Roscommon* (2), it was argued, unsuccessfully, that a decision of Justices returning a man for trial could be removed and quashed on *certiorari*; but the Court there held, that this could not be done; and the Lord Justice, in concurring, referred (page 179), to the fact that it was incomprehensible if the jurisdiction existed that this had never been done. Equally, in such a case as the present, it seems incomprehensible, if the power exists, that no instance can be adduced of an order of acquittal being quashed on *certiorari* in this Court.

For all these considerations I am clearly of opinion that the application must be refused.

(1) [1895] 2 I. R. 603. (2) [1894] 2 I. R. 158.

GIBSON, J.:—

The order of Quarter Sessions is impugned on two grounds, want of jurisdiction to hear the appeal, and bias.

The supposed defect of jurisdiction arises from the want of any proper recognisance by the Duke of Devonshire.

The argument on this head embraced the following points: the recognisance to be valid must be executed in person; where the appeal is joint the recognisance must be also joint; on a joint conviction, there can only be a joint appeal; even if the Messrs. Foley were competent appellants, there was no jurisdiction to interfere with the conviction so far as regarded the Duke, who had not presented any lawful appeal. These points were strenuously contested by the defendants' counsel, who argued in addition that the objections to the recognisance, if valid, could be, and had been, waived.

I have not been able to find any authority deciding that, where a party is legally competent to enter into a recognisance, any one else can do so on his behalf, or that a recognisance can be executed in the name of the principal by an agent. There was here no power of attorney, if that would have made any difference. The sureties must execute in person. I am inclined to hold (though it is not necessary in the view that I take to decide) that the recognisance so far as relates to the Duke was bad.

As to the other points discussed, there are numerous authorities on the old civil bill code, which, like the Petty Sessions Act, prescribed a recognisance as a condition to appeal, laying down that on a joint appeal all must join in the recognisance (see 2 Crawford and Dix, pp. 238, 250, 438, and Irish Circuit Cases, pp. 25, 26, 405); but that an appeal by some of those jointly affected was competent (see Irish Circuit Cases, pp. 238, 463, 25).

On the other hand, in *Reg.* v. *Justices of Fermanagh* (1), where the above decisions were not cited, it was held that, on a joint appeal, the appeal could be prosecuted by the appellant who had entered into a recognisance. In that case, however, the complainants, who were appellants, were common informers: and the appeal was under section 74 of the County Courts (Ireland) Act, 1877.

(1) [1897] 2 I. R. 603.

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The point is a difficult one, but I think that some of the parties convicted can appeal; that it is not necessary for all to join; and that, if this be so, the appellants, who have perfected the recognisance, can prosecute the appeal, notwithstanding that the notice of appeal purports to be joint. Otherwise, the right of appeal might be lost if any party refused or was unable to join in the appeal or in the recognisance.

Assuming that the Messrs. Foley's appeal was rightly before the Court, the necessary effect of acquitting them was to destroy the joint conviction in the Court below, which cannot stand as a separate conviction against the Duke.

In this view it is unnecessary to decide the question of waiver. During the argument I thought that the principle, that provisions for the benefit of a litigant can be waived by him, applied: *Parkgate Iron Company* v. *Coates* (1). There is no doubt that objections to recognisance, as a condition to a civil bill appeal, can be waived by conduct: Irish Circuit Cases, pp. 338, 438, 578.

But further consideration has suggested grave difficulties. Forms in which the public are interested (as in criminal cases) or matters which go to the root of jurisdiction, cannot be waived: *Wellesley* v. *Withers* (2); *Foster* v. *Underwood* (3). The Petty Sessions Act relates to criminal as well as civil proceedings; and it was held, in *Morgan* v. *Edwards* (4), that under the Case Stated Act there could be no waiver of the provision requiring the party aggrieved to apply for a case within three days. The Petty Sessions Act, sect. 24, only confers jurisdiction on the appellate tribunal "when an appeal shall have been so made;" and it may be that the recognisance (which must be transmitted to the Appeal Court) is an essential part of the appeal.

If the notice of appeal cannot be dispensed with, can a recognisance be waived? Here, it may be said, there was a recognisance; it is in due form, and all that is asked is that a technical objection to the sufficiency of part of the recognisance should be treated as abandoned. I do not finally decide the point, as it is not necessary to do so. If waiver is possible, I have no doubt that the prosecutor has precluded himself from objecting, by assenting to the order

(1) L. R. 5 C. P. 634.
(2) 4 E. & B. 759.
(3) 3 Ex. Div. 1.
(4) 5 H. & N. 415.

of adjournment of the appeal: *Todd* v. *Kelly* (1), and by then relying, in the prohibition proceedings, upon the Court of Quarter Sessions having entertained the appeal by reason of its having made such order. In the prohibition it was objected that the remedy did not apply where the Court had done nothing to show that it intended to exercise jurisdiction. Mr. Drohan's answer was that the appeal had been duly entered and adjourned. There was no suggestion that the appeal was incompetent, which might have been an objection to his application for prohibition. The appeal was throughout treated as a valid and effectual proceeding which the Quarter Sessions (unless restrained) had jurisdiction to determine.

The second objection to the order below was founded on bias alleged against Mr. Noonan, the magistrate who sat with the County Court Judge. As the statute, 13 & 14 Vict. c. 88, sect. 11, expressly enables a magistrate to adjudicate on a complaint brought by a Board of Conservators of which he is a member, the objection is based on the contention that Mr. Noonan (who had ceased to be a conservator long before the appeal was heard) took part in the resolution directing the prosecution. The peculiarity of the case is that, though this is the sole substantial ground of bias put forward in the prosecutor's affidavit, the bias relied upon at the bar is prejudice, not in favour of the prosecutor, but in favour of the Duke. It is hard to avoid a suspicion that the prosecutor, finding that Mr. Noonan could not be challenged for favour to the Duke, is using supposed bias in favour of himself as a pretext, in order to exclude him for bias quite the other way.

The argument put forward was that Mr. Noonan acted collusively in assenting to the prosecution, when he was only anxious to frustrate it. No such suggestion is made in the original nor indeed in any of the affidavits. If the Court was satisfied that the Justice supported the prosecution in order that, if his friendly efforts on the bench to procure an acquittal should fail, the Duke should be enabled to upset the conviction on the ground of the Justice having joined in the prosecution, there would be a case of

(1) Ir. Cir. Cas. 438.

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fraud and misconduct which would certainly, in a moral point of view, invite *certiorari* if the Court had jurisdiction to award it. But such misconduct is very improbable, and is certainly not proved.

On the affidavits, the prosecutor has not satisfied the *onus* of showing that Mr. Noonan was present or intelligently assented to the prosecution. From Mr. Drohan's own affidavit in reply it would seem that Noonan was opposed to any prosecution. There was no reasonable likelihood of bias. He was in no way identified with the prosecution.

Having arrived at this conclusion it is unnecessary to decide whether the mere fact of the charge having been dismissed would be an answer to *certiorari* founded on bias, if bias was proved. Whenever by any defect in record or jurisdiction the defendant was not lawfully liable to suffer judgment for the offence charged, as he was never in jeopardy, he could not plead *autrefois acquit* to a new indictment. If, from bias, corruption, or fraud, a Court of summary jurisdiction is disqualified from hearing a case, why should the possibility of relief be excluded because the tainted tribunal, in defiance of duty and objection, persists in going through the form of trying and determining, when the result in favour of the defendant may be a foregone conclusion. The defendant ought never to have been in peril, and never in truth was in peril in such a case. In many cases, like those under the Fishery Acts, the criminal procedure is really ancillary to civil rights. In felony, and most criminal cases, there is no remedy for a corrupt verdict of a jury, whether it be "guilty" or "not guilty"; but there is a remedy for a corrupt conviction by a Court of summary jurisdiction. Why should there be no redress where the Court, from bias or fraud, dismisses a case which it ought never to have tried? The remarks of Holmes, J., in *Lord Macnaghten's Case* (1) are worthy of consideration. Three of the Judges no doubt expressed strong opinions the other way, but the case itself is not a direct decision on the point, as, whether there was bias or not, the complainant had precluded himself from objection by accepting Lord Macnaghten as judge.

(1) [1895] 2 Ir. R. 603.

It was objected that, as *certiorari* was taken away, and there was no absence of jurisdiction, the remedy by *certiorari* was inapplicable. But wherever it is shown that the Court has not been properly constituted or that there has been fraud, the aid of this Court can be invoked.

A more weighty objection was that an adjudication affected by bias or fraud was voidable and not void. I agree; though in *Clarke's Case* (1), Andrews, J., allowed *habeas corpus* in a case where the conviction had not been quashed, treating it as entirely void. Whether the adjudication is voidable or void, the objection is that the biassed or corrupt tribunal ought never to have exercised jurisdiction. If a conviction within justices' jurisdiction is voidable, and can be quashed for bias, why should this Court be paralysed where the bias and corruption are exhibited on behalf of, and perhaps in active collusion with, a defendant? Precedent may, however, be too strong.

The only direct authority that I know of where a dismiss was quashed is *Rex* v. *Allen* (2), where, the Court of Quarter Sessions having reversed a conviction on technical grounds, the King's Bench quashed that decision, with the result that the conviction below stood. There are some remarks in this case bearing on the question whether the effect of quashing the order of Quarter Sessions would be to restore the conviction and extinguish the appeal. I am not satisfied that the appeal must be treated as spent where it was never properly heard. Might not continuances be entered for the purpose of disposing of the appeal? Might not *mandamus* go if necessary? I only notice the point lest it should be thought that I regarded it as clear that the appeal was exhausted, and that the quashing of the order left the conviction intact, discharged from any right of appeal. If that view were correct, it would be a strong argument against this Court exercising its jurisdiction to quash, if it has any discretion in the matter. I leave this with other problems to be solved when occasion arises.

(1) 26 L. R. Ir. 1. (2) 15 East, 333.

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KENNY, J. :—

I concur in the opinion that the cause shown should be allowed.

The decision on appeal of the Chairman and Justices is impeached on the ground that the tribunal was a non-competent one by reason of the bias of one of its members, Mr. Noonan, and on the further ground that the matter of the appeal was not properly before the Court, inasmuch as the necessary recognisance, which is a condition precedent to the hearing of the appeal, was never entered into by one of the appellants, the Duke of Devonshire.

On the question of bias, I confess that in the opening of the argument I was inclined to form the opinion that at the very least it would have been more becoming for Mr. Noonan, having regard to his previous action, not to have taken part in the hearing of the appeal. His position was this. In 1898, and previously, he had been a member of the Board of Conservators, and from time to time attended their meetings, and took part in their discussions. While still a conservator he proposed to sit as one of the Bench at Petty Sessions when the defendants were fined, and on being objected to on the ground that he had attended the meeting of the board at which the prosecution was directed, retired from the bench. There was nothing in the mere fact of his being a conservator to have disqualified him from sitting and adjudicating: 13 & 14 Viet. c. 88, s. 11. Subsequently to that, and after he had ceased to be a conservator, he sat with the resident magistrate on the hearing of another summons against the same defendants, and, it is alleged, held and expressed an opinion in favour of the view that there had been due and proper maintenance of the gap which is the subject of the present case. It appeared that at Quarter Sessions he was the only magistrate who expressed an intention of adjudicating with the County Court Judge. The case was also made that he was connected by marriage with the defendants Foley, and that he was also a tenant of theirs and of the Duke of Devonshire's. These circumstances were all relied on in argument before us as showing that there was a substantial case of suspicion of his being biased in favour of the defendants; and, as I have said, I was struck with them at the outset of the case, when it was forcibly contended that this gentleman's

sympathies and interests were so strongly enlisted on the defendant's side that it was impossible to suppose that his mind was unbiased. It, however, appears that this contention, which amounts to an assertion that Mr. Noonan was really the friend and sympathiser of the defendants, while he was pretending to be their accuser, was never put forward until the affidavits for the *certiorari* were filed. On each occasion when he was objected to, it was on the distinct ground that he took part in the proceedings of the conservators when the prosecution was ordered. In my opinion we should not go outside of that objection when considering the allegation of bias. It was an objection made deliberately, and after consideration, on two occasions, with all the knowledge which the secretary of the conservators had when he made his affidavit, and yet it was confined to Mr. Noonan's position as accuser and that alone. The Lord Chief Justice has referred at length to the circumstances of the meeting of the 25th August, 1898, at which it was alleged that the proceedings against the defendants were ordered, and it would be but a waste of time for me to repeat them. It is enough for me to say that I am not satisfied that Mr. Noonan was present at that period of the meeting when the somewhat curious direction was given for the "carrying out" of the prosecution; and I have no reason to doubt his statement that he never heard of the resolution on the subject (if indeed this "direction" to the secretary, which does not appear from the minute book to have been formally proposed or seconded, or put to the meeting, can be called a resolution) until the summons had been taken out. The evidence on the subject is vague and contradictory. The only inference to be drawn from the nature and form of the objection made at sessions is that, in the words of Lord Esher, in *Allanson* v. *The General Council of Medical Education* (1), he might reasonably or substantially be suspected of bias in favour of the prosecutors. The affidavits and the contention before us ask us to infer a bias the other way.

The evidence, in my opinion, falls far short of establishing that he ever placed himself in the position of accuser of the

(1) [1894] 1 Q. B. 759.

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defendants. That is the only ground on which he was ever asked to retire from the bench, and it cannot, in my opinion, be sustained. As to Mr. Noonan having an "interest" in the subject-matter of the litigation, it does not appear that he had any, one way or the other, which would suggest the probability of real bias. The tendency of sympathy in one direction is not to be confounded with an inclination to bias which would so affect the judgment as to render it impossible for him to impartially adjudicate. Even preconceived opinions held and expressed do not constitute bias.

As to the other grounds for making the conditional order absolute, namely, that the recognisance, which ought to have been entered into by the three appellants, was never signed by the Duke of Devonshire, it is contended by the defendants that it is too late to attack the order of the Quarter Sessions on that ground. The case came before that Court on the 30th September, 1899, and was formally adjourned by consent, and no question on the recognisance was then raised. That the adjournment was the outcome of an understanding between both sides, I entertain little doubt. A week before the adjournment, I, as Vacation Judge, made a conditional order in the matter of the present summons for a writ of prohibition; and I am satisfied, from the statements then made to me, that the adjournment of the appeal was agreed on in order that the arguments on the conditional order for prohibition might first be disposed of. When the latter did come on, the allegation was made, and the contention pressed by the prosecutor, that the Court of Quarter Sessions, on the occasion of the adjournment, had seisin of the case, and had entered upon it; and it is now said that these circumstances constitute a waiver of the point founded on the absence of a recognisance by one of the three joint appellants. If this case were a civil one, the point of waiver might be a very substantial one; but it is a criminal prosecution, and the objection to the recognisance is alleged to go to the root of the jurisdiction of the Quarter Sessions. The argument is that it is not a mere objection to want of or to defective process or the like, which could be got over by the defendant appearing. In cases of alleged "waiver" by appearance, the distinction is invariably

taken between cases of a civil nature and of a criminal nature; and between objections that are capable of being waived and those that constitute the very foundation of the jurisdiction of the Court: *The Scotton* (1); *Reg.* v. *Berry* (2); *Reg.* v. *Hughes* (3).

This question gives rise to grave consideration; but having regard to the opinion at which I have arrived in common with the other members of the Court, that, even if there was no waiver, and the Duke of Devonshire's recognisance was bad—the order of the Quarter Sessions can be supported on other grounds, it is unnecessary for me to express any opinion on the point.

The three defendants were summoned as "owners" of the weir for a joint offence; they were jointly convicted at Petty Sessions; they jointly appealed; and they purported to enter into a joint recognisance to prosecute the appeal. There can be no doubt that so far as one of the defendants is concerned, the recognisance may be taken to be a nullity. But it is still the recognisance of the other two.

The Court of Quarter Sessions has heard the case on the merits, and on the merits has reversed the decision below, *in toto*. It has in effect decided that the free gap was maintained in accordance with the provisions of the Act. I apprehend that the Foleys alone might have appealed from the order of Petty Sessions, and, if so, is their appeal, which so far as they are concerned is regular, to be nugatory because the appeal of their co-defendant is irregular? If they had a right to a separate appeal, I am of opinion that their appeal was not in a worse position, because the recognisance of the Duke of Devonshire was not entered into.

Can then the reversal enure for the benefit of all? It seems to me impossible under the circumstances to hold that it should not. The default charged is the default not of one defendant or two, but of all three; and once it is held that there was a proper gap maintained, the necessary conclusion follows that there could be no default on the part of any one of the defendants. I, therefore, think that if the order of Quarter Sessions is good

(1) 13 L. J. M. C. 58; 5 Q. B. 493. (2) 28 L. J. M. C. 86.
(3) 4 Q. B. D. 614.

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in respect of the Foleys, their co-defendant is entitled also to the benefit of the reversal.

A further and very serious difficulty, in my opinion, lies in making any distinction between the defendants. On *certiorari* this Court must either quash the order impeached or affirm it. There is no power to make a new order, and it appears to me that if we were to quash the order so far as one of three joint defendants was concerned, and decline to quash it as to the others, we would be making something very like a new order.

Another, and most important question, on which I offer no opinion, was argued, namely, as to the right to *certiorari* in the case of an acquittal, and we were much pressed with the conclusions come to by the majority of this Court in *Reg.* v. *The Justices of Antrim* (1).

If the Court was not competent to entertain the appeal on the ground of bias, their order would be voidable, not void (2); and we were told, in the course of the argument, that, if it were quashed, the proceedings on the appeal would determine, the conviction below would stand, and there could be no new appeal. As to this contention, I will only say that I can well conceive cases in which it might be very necessary to apply the reasoning of Holmes, J., in his judgment in the *Antrim Justices' Case* (1), in which he differed from the other members of the Court on the question of the writ being applicable in cases of acquittal. Furthermore, I may say that the issuing of this writ being within our judicial discretion, I would hesitate to grant it if the inevitable result were the irrevocable setting up of an order which on the merits had been reversed by Quarter Sessions.

In concurring in the decision arrived at, I wish to add one observation as to a charge that was inferentially made in one of the affidavits filed in support of the conditional order. It was insinuated that one of the defendants, the Duke of Devonshire, had, as lieutenant of the county, nominated to the commission of the peace two gentlemen, in order that they might, if possible, adjudicate on this case, presumably in the interest of himself and his lessees. A more serious charge against anyone, and particularly

(1) [1895] 2 I. R. 603. (2) Crimes Act Cases, 137.

against a man filling a high public position, it is impossible to conceive. In plain language it means that the Duke of Devonshire in this case was attempting to pollute the springs of justice by procuring creatures of his own to adjudicate on his case. The charge had to be met, and it now appears that one of the gentlemen, so far from being a sympathiser with the defendants, was interested in the upper waters of the river, and would naturally be opposed to the action of the defendants, while the other was a gentleman of position who had migrated from the county of Limerick, and was reasonably entitled to occupy in Waterford a *status* similar to that which he had enjoyed in the former county. The charge was a reckless and a baseless one. Indeed it was more; it was ludicrous in the extreme: but it is an illustration of the absurd length to which parties are sometimes prepared to go in order to prop up a case, the inherent weakness of which is manifest.

Solicitor for the applicant: *Carroll.*
Solicitor for the respondents: *Verlin.*

A. E. R. J.

REG. *v.* M'HUGH (1).

Information ex officio—*Libel—Seditious libel—Pleading—Omission to use the word "seditious"—Plea of justification, under* 6 *&* 7 *Vict. c.* 96, *s.* 6—*Plea denying malice, under* 51 *&* 52 *Vict. c.* 64, *s.* 4.

An information exhibited for seditious libel is not bad because the words "seditious," "seditiously," are not expressly used, if it clearly appear on the face of the information that the publication was with seditious intent.

To an information for seditious libel, it is not open to the defendant to plead justification under Lord Campbell's Act (6 & 7 Vict. c. 96), s. 6, nor fair comment and absence of malice, under 51 & 52 Vict. c. 64, s. 4.

DEMURRER to the defendant's pleas to an *ex officio* information at the prosecution of the Attorney-General. The defendant was

(1) Before LORD O'BRIEN, L.C.J., and MURPHY, GIBSON, and MADDEN, JJ.

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the proprietor of a Sligo newspaper, and the publications in question had been printed in his journal.

The information set forth, in effect, that at the Sligo Winter Assizes, 1899, two men, A. Muffeny and A. Maguire, were indicted, tried, and convicted, before Andrews, J., and a jury of the county, on a charge of conspiracy, and that the defendant M'Hugh,

> "being an evil disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the said William Drennan Andrews and the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that the said jurors had violated their oaths as such jurors, on the 16th day of December, in the year aforesaid wickedly and maliciously did print and publish, and cause to be printed and published, a certain false, wicked, scandalous and malicious libel of and concerning the administration of justice in this kingdom, and of and concerning the said Right Honorable William Drennan Andrews and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following :—

[Here followed the libel, which in substance and effect, was a scandalous and malicious libel, concerning the administration of justice in Ireland, and concerning the Judge and jury who had tried the case.]

> "to the great scandal and reproach of the administration of justice, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity."

The information further alleged that, upon and after the trial of Muffeny and Maguire—

> "Patrick A. M'Hugh (the defendant), being an evil-disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that the said jurors had violated their oaths as such, and in determining the said issue had acted partially and improperly, . . . wickedly and maliciously did print and publish and cause to be printed and published a certain false, wicked, malicious and scandalous libel of and concerning the administration of justice in this kingdom, and of and concerning the jurors by whom the said issues were so tried as aforesaid, according to the tenor and effect following :—

[Here followed a further libel, which in substance and effect, was a scandalous and malicious libel, concerning the administration of justice in Ireland, and concerning the jury who had tried the case. This libel was a report of a speech made by a third person at some public meeting.]

"to the great scandal and reproach of the administration of justice, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity."

The information further set forth that, upon and after the trial of Muffeny and Maguire—

"Patrick A. M'Hugh, being an evil-disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that the said jurors had violated their oaths as such, and in determining the said issue had acted partially and improperly, . . . wickedly and maliciously did print and publish, and cause to be printed and published, a certain false, wicked, malicious and scandalous libel of and concerning the administration of justice in this kingdom, and of and concerning the jurors by whom the said issues were so tried as aforesaid, according to the tenor and effect following:—

[Here followed a further libel which mentioned by name the jurors who tried the case, and in substance and effect was a scandalous and malicious libel, concerning the administration of justice in Ireland, and concerning the jury who had tried the case.]

"meaning thereby that the jurors aforesaid, by whom the said issue had been tried as aforesaid, had found a verdict contrary to law and the facts at the bidding of those acting for the Crown, to the great scandal and reproach of the administration of justice, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity."

The substance of the libels is more fully given in the judgments of the Court.

The defendant M'Hugh appeared and pleaded—

(1) The general issue.

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(2.) As a second plea:

"That the panel of jurors of the county of Sligo prepared for the said Assizes consisted of 258 special jurors, of whom about 180 were members of the Roman Catholic church; that in the empanelling of the jury for the trial of the said Arthur Muffony and Anthony Maguire, the Crown Solicitor, who instructed the counsel for the prosecution, ordered the Catholic jurors who were called to stand by, and refused to allow them to be sworn until he succeeded in getting a jury composed exclusively of Protestants to try the said traversers, who were both members of the Roman Catholic church; that the twenty-two Catholic jurors who were thus ordered by the Crown Solicitor, without cause assigned or challenge, to stand by, were not permitted to serve on the said jury because they were Roman Catholics, and for no other reason, and that a trial so conducted was calculated to bring the administration of justice into hatred and contempt, and was contrary to law, and so the said Patrick A. M'Hugh saith that the said alleged libels consist of allegations true in substance and in fact, and of fair and reasonable comments thereon."

(3.) As a third plea:

"And the said Patrick A. M'Hugh further saith that at the time of publishing the said alleged libels it was for the public benefit that the matters therein contained should be published, with a view of procuring a reform of a scandalous procedure which has prevailed in Ireland for many years, which is unwarranted in law, and which has brought the administration of criminal justice in Ireland into hatred and contempt."

(4.) As a fourth plea:

"And as a further plea the said Patrick A. M'Hugh saith with reference to the said alleged libel of the 10th day of February, 1900, that it is portion of the report of proceedings of a public meeting lawfully convened for a lawful purpose, and open to the public, and was a fair and accurate report, published without malice and for the public benefit."

(5.) Lastly—

"And so the said Patrick A. M'Hugh saith that he published the said alleged libels as he lawfully might for the causes aforesaid, and this the said Patrick A. M'Hugh is ready to verify."

The Attorney-General demurred to the defendant's pleas (other than the general issue) and prayed judgment.

Upon joinder in demurrer the following points were set down for argument:—

1. That the said Patrick A. M'Hugh is not entitled by the common law to plead the matters set out in the 2nd and 3rd paragraphs of his plea in answer to the information.

2. That the said Patrick A. M'Hugh is not entitled under the statute 6 & 7 Vict. c. 96, to plead the matters set out in said 2nd and 3rd paragraphs of his plea in answer to the information.

3. That the said Patrick A. M'Hugh is not entitled by the common law to plead the matters set out in the 4th and 5th paragraphs of his plea in answer to the information.

4. That the said Patrick A. M'Hugh is not entitled under the statutes 44 & 45 Vict. c. 60, and 51 & 52 Vict. c. 64, or either of them, or any other statute in that behalf, to plead the matters set out in said 4th and 5th paragraphs of his plea in answer to the information.

The Attorney-General (*The Right Hon. John Atkinson, Q.C.*), and *The Solicitor-General* (*Wright Q.C.*), (*Fetherstonhaugh, Q.C.*, and *Morphy* with them), for the Crown.

Macinerney, Q.C. and *D. Kehoe*, for the defendant.

The arguments of counsel are fully referred to in the judgment of Lord O'Brien, L.C.J.

The following authorities were cited: *R.* v. *Duffy* (1); *Ex parte O'Brien* (2); *R.* v. *Watson* (3); *R.* v. *White* (4); *R.* v. *Munslow* (5); *Davison* v. *Duncan* (6); *Popham* v. *Pickburn* (7); *Reg.* v. *Gray* (8); Stephen's Criminal Law, p. 70 (the definitions of "*seditious conspiracy*," "*seditious libel*," "*seditious intent*"); 1 Russell on Crimes, pp. 622–624; Archbold (ed. 1900), pp. 943, 1041, 1067; *Steele* v. *Brannan* (9); *R.* v. *Perrott* (10).

Cur. adv. vult.

(1) 2 Cox, C.C. 45; 9 Ir. L. R. 329.
(2) 15 Cox, C.C. 180; 12 L.R.Ir. 29.
(3) 2 T. R. 199.
(4) 1 Camp. 359.
(5) [1895] 1 Q. B. 758.
(6) 7 E. & B. 229.
(7) 7 H. & N. 891.
(8) 10 Cox, C.C. 189, 190.
(9) 41 L. J., M. C. 85.
(10) 2 M. & S. 379.

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Nov. 26.

LORD O'BRIEN, L.C.J. :—

This case comes before the Court on a demurrer taken to certain pleas filed by the defendant to the information, which has been exhibited by the Attorney-General in his official capacity. The Attorney-General alleges that the pleas are insufficient in point of law, and bad; and the question we have to determine is whether these pleas are good or bad in law.

In order to understand the issue presented for our determination it is essential to ascertain what the information and the pleas respectively allege. The information, after stating in effect that Mr. Justice Andrews was constituted Judge at the Connaught Winter Assizes of 1899, and that two men named Muffeny and Maguire were tried before him with a jury, alleges :—

> "That the defendant wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalise and vilify Mr. Justice Andrews and the jurors by whom the issue was so tried, and to cause it to be believed that the jurors had violated their oaths as such jurors, wickedly and maliciously did print and publish, and caused to be printed and published, a certain false, wicked, scandalous, and malicious libel of and concerning the administration of justice in this kingdom, and of and concerning the said Right Hon. William Drennan Andrews and the jurors by whom the issue was tried, according to the tenor and effect following :—
>
> "'Yet we have the Crown and twelve Protestant jurors, whose verdict looks as if given by order when it was so clearly anticipated, declaring as criminal the action of Messrs. Muffeny and Maguire in condemning what Hughes himself practically admitted deserved condemnation. Could there be a greater mockery of justice, or a greater farce played by a government, which thinks its so-called law as embodied even in such a minion as a removeable magistrate, not sufficiently respected sometimes. But such is English rule in Ireland, aided by the hacks of Dublin Castle and by a certain section of bigoted, intolerant, narrow-minded, ignorant Tories, who are ever ready to become willing tools to perpetrate a dirty job at the beck of Dublin Castle. Unfortunately, our town and county furnish a small section of such Protestants. It is singular that whenever the Castle has a "job" to do it relies with confidence on these bigots, and as events here have so often proved they are never disappointed.'"

I stop to consider the meaning of the paragraphs I have read. What do these paragraphs in effect convey? Plainly, I think, this—that a corrupt Government employed corrupt tools, namely,

a Protestant jury, to give a false verdict, and that the Protestant jury willingly and consciously gave a false verdict in obedience to the behests of those who employed them, and that this was only a single instance in a corrupt and scandalous system; that, in fact, to use the language of the impugned publication, "whenever the Castle has a job to do, it relies with confidence on those bigots, and as events here have so often proved, they are never disappointed."

Now, this is the matter which, amongst others, is complained of in the first count of the information. Let me see what the plea is; but, before I read the plea, I desire to point out the necessary requirements of a plea of justification, for it is with the plea of justification we are concerned here. It is an elementary rule of pleading that a defence by way of justification must justify the sting of the libel, and it is quite plain that a plea of justification under Lord Campbell's Act must deal specifically with each defamatory allegation complained of. This is plain from the language of the Act itself. I turn, then, to the plea. What do I find in it? This ground of defence, namely,—that the jury was exclusively Protestant, and that Catholics were set aside because they were Catholics.

It is obvious that this is no justification at all, because it does not even purport to justify what is alleged. The sting of what is alleged is that the jury were not merely Protestants, but that they were unjust and corrupt—the corrupt instruments of a corrupt Government. To be a good plea, if such matters could be legally pleaded at all, the plea should allege that the jurors were not alone Protestants, but corrupt: that they were instruments of a corrupt Government, and were, pursuant to an unjust and corrupt system, put into the jury-box to return an unjust verdict. The pleading most obviously violates the elementary rules of pleading, and is clearly bad.

Now, let me turn to the third count of the information, and let me read the impugned publication. It runs thus:—

> "The Sligo Packed Jury.—We give below a list of the Sligo packed jury in the case of Messrs. Muffeny and Maguire, at the Connaught Winter Assizes. The men who did the bidding of the Crown were . . ."

The names follow.

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I do not stop to comment upon the great, the very grave responsibility, incurred by holding up to public odium, by name, the jurors who convicted men who were represented as martyrs. But what is the obvious meaning of the words? They plainly impute that the jurors were the servile instruments of those who corruptly impanelled them. The plea leaves this imputation wholly uncovered. It is quite clear that, tested by the ordinary rules of pleading, the plea is obviously bad.

The Attorney-General, however, in his lucid argument, took a higher ground. He said that these pleas purported to be pleaded under Lord Campbell's Act, 6 & 7 Vict., and he contended that they were wholly without the scope of that Act, and were, therefore, demurrable. He referred to the fact that before Lord Campbell's Act the truth could not be pleaded; that the maxim prevailed, "the greater the truth the greater the libel"; and he contended that that statute was confined to personal libels.

He also pointed out that the privilege of pleading the truth of a libel was made by that Act expressly subject to the condition that it should be alleged in the plea that the publication of the matters charged was for the public benefit; and he contended that, as it could not be for the public benefit to publish matter that was seditious, the plea in the present case was without the scope of the Act, and wholly bad.

Now, it is certainly true that seditious libels are without the scope of Lord Campbell's Act. It has been so decided in *The Queen* v. *Duffy* (1) by a Court consisting of very eminent Judges—Blackburne, Crampton, Burton, and Perrin. Chief Justice Blackburne, when dealing with the scope and object of Lord Campbell's Act, said:—

> "The benefit which was withheld from defendants in criminal prosecutions for libel, of pleading a justification, has been extended to those cases by this statute. But on reference to the terms of the statute itself, it requires very little consideration to see that the privilege to plead the truth of the facts charged is given where it is for the public benefit that the facts should be published: that is, it makes the individual liable to have the truth stated where it was for the public benefit; but the public

(1) 2 Cox, C. C., 45.

benefit is the only object the statute has in view in such case, and no one can contend that libels of a blasphemous or treasonable or seditious nature can come within this statute, for such never can be of any public benefit."

Mr. Justice Crampton, in giving judgment in the same case, said:—

"My opinion coincides with the rest of the Court that this statute is only applicable to personal libels. It would be narrowing it too much to say it applied only to private libels. The justification allowed by this statute to be put in is just such a one as would be a justification in a civil action for libel before the statute. It was personal libels that were intended by the Legislature to be affected by the Act."

The decision in *Duffy's Case* (1) was fully adopted and approved of in *Ex parte O'Brien* (2).

It is clear, then, that Lord Campbell's Act does not apply to seditious libels, and the question remains, are the libels complained of seditious libels? The word "seditious" is certainly not used in the information; but we are all of opinion that it is not a word of art, and that, if the substance of what is a seditious libel is stated, this is enough. In the long history of seditious libels it has never been decided that it was essential to employ in the pleading the words "seditious" or "seditiously." On the contrary, there are cases in the books, which have been referred to during the argument, in which, though the prosecutions were plainly for seditious libels, the words "seditious" or "seditiously" were not used. It was certainly thought in my day at the Bar, that it was essential in an action for a prosecution for libel to use the words "malice" or "maliciously;" but Lord Russell, in *The Queen* v. *Munslow* (3), entirely repudiated the notion; and he, and the other Judges who sat with him in that case, held that, if what was substantially equivalent to the legal interpretation of the word "malice" was averred, the pleading could not be successfully impeached for absence of that term.

Have we then in this case, in substance, the essential elements

(1) 9 Ir. L. R. 329. (2) 12 L. R. Ir. 29. (3) [1895] 1 Q. B. 758.

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of a seditious libel? No doubt the words complained of are defamatory, but have we in the averments what is equivalent to the allegation of a seditious intent? This brings me to the consideration of what is the legal definition of a seditious intent. It is correctly stated in the late Mr. Justice Stephen's work on the criminal law. He there defines a "seditious intention" to be "an intention to bring into hatred or contempt, or to excite disaffection against, the person of Her Majesty, her heirs or successors, or the Government and Constitution of the United Kingdom as by law established, or either Houses of Parliament, or *the administration of the law* . . ." I stop here and do not give the full definition. I give only the relevant portion. An intention, then, to bring into hatred or contempt the administraton of the law falls within the definition of seditious intent.

This being so, I turn to the information to ascertain whether what constitutes a seditious intent is sufficiently alleged therein. I find that it is alleged "that Patrick A. M'Hugh, wickedly and maliciously contriving and intending to bring the administration of justice in this Kingdom into contempt," did publish the libel complained of. This is the intent alleged against the defendant, and it is one of the intents which make libellous matter seditious. I am therefore of opinion that what is complained of is a seditious libel; that a plea under Lord Campbell's Act cannot be pleaded; and that therefore the plea under discussion is unsustainable and bad in law.

It was argued that, having regard to the averments in the information, a verdict might be obtainable against the accused for a libel against Mr. Justice Andrews personally, or for a libel upon the jurors personally, irrespective altogether of any seditious intent. Even if this were so, the plea would still be bad, because it purports to extend to the first and third counts in their entirety; and they clearly, in so many words, complain of an intent to bring the administration of the law into hatred and contempt—which is clearly seditious. But I deny that the libel can be regarded as anything but a seditious libel in relation to Mr. Justice Andrews and the jury. Mr. Justice Andrews, if attacked at all by this libel—and this will be for the jury to determine—was attacked, not in his personal and private capacity, but as the Judge who

presided at the trial under Her Majesty's Commission. If he was attacked at all, he was attacked in relation to the judicial character with which he was clothed by Her Majesty's Commission, and in relation to those functions which he was bound under the sanction of his oath to discharge without fear, favour, or affection. The jury were certainly attacked in relation to their action as jurors when empanelled upon their oaths to render a true verdict between the prisoners and the Crown. The libel in the first count of the information alleges that the trial was a mockery of justice. The article complained of in the third count says that the defendants were the victims of a cruel wrong perpetrated in the name of justice. Is this a mere personal attack? Most certainly not; and the fact that it is not, would be sufficient, according to the case of *The Queen* v. *Duffy* (1), to show that it was not within the scope of Lord Campbell's Act. Having regard to the prefatory averments in the information, to the intent which has been laid, and to the language of the impugned articles, which are set out in the information, I am of opinion that what is charged and complained of is an attack on the administration of the law, with the object of bringing it and its ministers into obloquy and contempt—in other words "a seditious libel."

As I have already stated, if these articles refer at all to Mr. Justice Andrews, it is in his judicial character that they refer to him. In his private personal character a Judge receives no more protection from the law than any other member of the community at large; and, even in his judicial character, he should always welcome fair, decent, candid, and I would add, vigorous criticism of his judicial conduct; but, on the other hand, deliberate misconduct in his judicial character must not be imputed. If a Judge deliberately misconducts himself in his judicial office, the Constitution has provided a remedy—his removal.

The law in this respect is correctly stated by Mr. Odgers in his book on libel. He says to assert that a judge had been bribed, or that in any particular case he had endeavoured to serve his own interests, or those of his friends, or his party, or had wished to curry favour at Court, or was influenced by fear of the Govern-

(1) 9 L. R. Ir. 329.

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ment, or of any great man, or by any other motive than a simple desire to arrive at the truth, and to mete out justice impartially, is seditious.

It is plain then that the plea as pleaded to the first and second counts is bad; it is pleaded in violation of the common law rules of pleading, and is not warranted by Lord Campbell's Act.

I now turn to the only remaining plea, namely, to the plea which is pleaded to the second count of the information. The Attorney-General alleges that this plea is insufficient in law and bad. Let me see what it states. The plea is in a few words, and is as follows:—

> "And as a further plea, the said Patrick A. M'Hugh saith, with reference to the said alleged libel of the 10th of February, 1900, that it is portion of the report of proceedings of a public meeting lawfully convened for a lawful purpose and open to the public, and was a fair and accurate report, published without malice and for the public benefit."

This plea is evidently intended to be pleaded under the provisions of the 51 & 52 Vict. c. 64, s. 3. That section provides that a fair and accurate report published in any newspaper of the proceedings of a public meeting shall be privileged, unless it be proved that such report or publication was published or made maliciously. Public meeting is defined by the section to mean any meeting *bona fide* and lawfully held for a lawful purpose. There is in the section the important proviso that nothing in the section should be deemed or construed to protect the publication of any matter the publication of which is not for the public benefit. It is an express requirement of the statute *that nothing shall be published the publication of which is not for the public benefit.* The plea alleges that the publication in question was for the public benefit.

Now, let me see what the publication was. In the count to which the justification is pleaded an intent is laid, and the matter published is set out *in extenso.* The matter published consisted of a speech delivered in county Sligo, with reference to the trial of the prisoners, Muffeny and Maguire—the same trial as is referred to in the other counts of the information. The intent laid is that the defendant, by the publication, intended to bring the administration of justice in this kingdom into contempt, and to scandalise

and vilify the jurors by whom the issue was tried, and to cause it to be believed that the jurors had violated their oaths. This is the intent laid. The language of the speech which the count alleges was published with what in substance was a seditious intent—namely, to bring the administration of justice into obloquy and contempt,—is as follows:—

"It is a terrible thing to say that Mr. Muffeny and Mr. Maguire, who were not guilty of any crime except contributing to the peace of the district by attempting to blot out land-grabbing, with all its bad consequences, should be sent to jail for six months. (Cries of 'shame.') Why, those gentlemen did more for the peace of the district than all the paid police in it. (Hear, hear.) For trying to do so they are now in Castlebar Jail—sent there by a packed jury in Sligo. (Groans.) No matter what religion men may profess, or what politics they hold, the men who are capable of doing that sort of dirty work, are not worthy of the respect, patronage, or friendship of their neighbours. (Hear, hear.) No matter where such hail from—either from the town or country—they should be taught a lesson in each district. If they ask or need your patronage, friendship, or support at any time, you should know how to treat them—how to treat those who went into a jury-box, where men of a particular creed or political profession were charged with what was only an offence according to the ideas of English law, and bring in a verdict of guilty, and thus consign them to a prison cell. (Cheers.) We cannot speak too strongly on this matter. (Hear, hear.) No matter where one of those fellows may be, no matter what his lot is,—it is the duty of every branch of the United Irish League, within whose confines such a person is to be found,—to use the words I used a couple of months ago in reference to others—'At him again, boys!' Those perjured partisan Orangemen in the County of Sligo, who do the bidding of Dublin Castle, are the worst enemies you have. (Applause.) It is your duty to band yourselves together to remove this dark blot on the name of Sligo. There is no use for me to go into details, and it would be an insult for me to point out to the intelligent men of Sligo the duty they owe to themselves and to their country. Everyone knows where the shoe pinches. No law compels a man to patronise, assist, or lavish his friendship on, any man who goes into a jury-box and finds a verdict—an unjustifiable verdict—which sends a Nationalist to jail for trying to keep peace and goodwill in a district. (Cheers.) This meeting should be the commencement of hundreds of meetings, till Sligo rings with a deep indignation at the conduct of those men—I will not call them men, but ruffians—who did the dirty work of Dublin Castle in the Sligo County Courthouse."

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This is the speech. It is hardly necessary to comment upon it. I must be careful; Mr. M'Hugh is to be tried; and, lest I should in any way prejudice his fair trial, I must not say one word more than is absolutely demanded by the exigency of the case, and the necessary requirements of a decision upon the questions of pleading submitted for our determination. But is it not obvious that this speech was an intemperate attack upon the administration of justice? It alleges in so many words that the men who were convicted were not guilty of any crime; that they were sent to Castlebar Jail by a packed jury; that the members of the jury were not worthy of the respect, patronage, or friendship, of their neighbours; that they should be taught a lesson in each district; that they had brought in a verdict of guilty in a case where the offence charged was a crime only according to the ideas of British law; that the people should "have at them again" in obedience to a previous incitement couched in the same language, "Have at them again, boys"; that the jury were "perjured partisan Orangemen" of the County Sligo, who did "the bidding of Dublin Castle," and were the worst enemies of the people; that the jurors were not to be styled men, but "ruffians," who did "the dirty work" of Dublin Castle in Sligo Courthouse. These are the allegations in the impugned matter; and can anyone say that it was not a most intemperate attack upon the administration of justice? The language of obloquy was well nigh exhausted as regards the jurors. They were styled "perjured ruffians," and, for their alleged misconduct in not ignoring "English law," the people were to "have at them again." Taking then the prefatory averments, and in particular the averment of what is clearly in substance the averment of a seditious intent, and reading the language complained of in connexion with these averments, I think it is clear that what is charged against the defendant is the publication of a seditious libel. This being so, the plea is, in my opinion, excluded for the same reasons that the plea was held inapplicable in *Duffy's Case* (1). Still further, the fact that the recent Act of 1888 provides that the defences under it shall not be available if a reasonable letter or statement by way of contra-

(1) 9 Ir. L. R. 329.

diction or explanation was refused to be inserted in the newspaper, shows that the Act was conversant with personal libels, and not with libels upon the administration of justice. The apology or explanation which the Act contemplated was an apology or explanation made to, or in relation to, an individual. It would be very far-fetched to suppose that the Act contemplated a man who was guilty of a seditious attack on the administration of the law making an apology to the Attorney-General for his delinquency.

Before I conclude I desire to point out that, whilst Mr. Macinerney and Mr. Kehoe delivered a most able argument with reference to the plea which has been pleaded to the first and third counts of the information, they did not say one word in vindication of this last plea, which was purported to be pleaded under the Law of Libel Amendment Act, 1888. Having regard to the allegation in the plea denying malice, I should have preferred that some effort had been made to support it; but the plea, if not expressly, was practically abandoned.

The demurrer must be allowed.

MURPHY, J.:—

I entirely concur in the judgment of the Lord Chief Justice, and do not think it necessary to add anything to what he has said.

GIBSON, J.:—

The second and third pleas are clearly unsustainable. In the first place, if the Act 6 & 7 Vict. c. 96, s. 6, applied, a justification under that enactment should be pleaded in the manner then required in an action for defamation. To be valid, the pleas, which profess to justify the whole of the libels of December 16th and April 7th, should specifically justify the entire substance of the libels. This they do not do, either in form, or in substance.

Secondly, if the libels are charged as seditious libels, no justification at all is competent. The information does not use the word "sedition," a term which, since Lord Campbell's Act ought

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always, in case of seditious libels, to be employed in order to avoid embarrassment and prejudice to the accused. Still the word is not, like "murder" or "felony," a term of art, for which no equivalent substitute is admissible. An intent to bring the administration of justice into contempt is a seditious intent, and not the less so because it is associated with aspersions on the Judge or jury who tried a particular case. The information here alleges what the law defines to be a seditious intent. The thing is there though the word is not.

The fourth plea turns on 51 & 52 Vict. c. 64, s. 4. The express exception of blasphemous and indecent libels may be accounted for by the previous state of the law as to such libels, and by the fact that the mischief of such publications is to a great extent independent of intent. The *onus* of proving malice is thrown on the plaintiff or prosecutor. Malice *prima facie* relates to an individual, and the proviso as to contradiction or explanation appears to apply to personal libels. A denial of malice, whether necessary or not, cannot be treated as a denial of the personal seditious intent expressly charged against the publisher. If such seditious intent is not traversed, the section does not protect the publisher. There may be a seditious speech at a lawful public meeting. Such sedition might be against the Crown. A newspaper publisher who identified himself with the offence and published the speech with seditious intent could not claim immunity merely because there was no malice against the individual occupant of the Throne.

No argument was addressed by defendant's counsel to this plea, which was practically abandoned, and I need not discuss it further.

MADDEN, J.:—

I shall consider this case, in the first instance, on the assumption that the offence charged in the information is that known as seditious libel. Sedition in all its forms, including seditious libel, is an offence against society. It is one of the crimes classified by Sir James Stephen, in his Digest of the Criminal Law, under the heading of "Offences against Public Order." In order to constitute the offence of seditious libel there must be something more

than the publication of a defamatory writing. The publication must have been made with the intention to offend against public order. This intention is of the essence of the offence. It may, of course, be inferred from the nature of the publication; but in the absence of an intention of this kind the publication of writings, be they ever so defamatory, does not constitute the offence of seditious libel, and the question of the existence of this intention, in any particular case, is one for the jury.

A defamatory libel, on the other hand, is primarily an offence against the person. It may be the subject either of a civil action, or of a criminal prosecution for misdemeanour, because (as is pointed out in Hawkins' Pleas of the Crown) it has a tendency to disturb the peace of the realm. The person libelled may be a private person, or a public official; but, unless a seditious intention is charged, the offence remains defamatory libel, and nothing more.

It is important to bear in mind the essential distinction between these two offences in considering the statutes that have been passed for the amendment of the law of libel.

Prior to the passing of Lord Campbell's Act (6 & 7 Vict. c. 96) the law with regard to defamatory libel was in an unsatisfactory condition. Students of Bentham will remember his scathing denunciation of the maxim,—"The greater the truth the greater the libel," in support of which—as of other false principles, in the uprooting of which he took so great a part—specious arguments were adduced by the lawyers of the day. A defendant in a civil action for a defamatory libel could aver the truth of the matter alleged; but, if he were a traverser in a criminal prosecution for the same libel, proof of the truth of the libel formed no defence. In this state of the law Lord Campbell's Act was passed, which rendered it competent for the traverser in a prosecution for defamatory libel to establish, by way of defence, first, that the alleged libel was true, and, secondly, that it was for the public benefit that it should be published. It is evident, from the title, the preamble, and every section of the Act, that it applies to the offence against the person, known as "defamatory libel," and not to the offence against public order, known as sedition. It is not necessary to elaborate this proposition, for

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it has been conclusively established by the decisions of this Court in the cases of *Reg.* v. *Duffy* (1) and *Reg.* v. *O'Brien* (2). It is however important to note the principle on which these cases have been decided, in view of the consideration which arises with reference to the plea to the second count of the information.

It is evident, I think, that the principle upon which these cases were decided is equally applicable to the provisions of the fourth section of the Law of Libel Amendment Act, 1885. This statute, as well as Lord Campbell's Act, was passed for the purpose of amending the law, not of sedition, but of libel, and they are so entitled. The first principles of the decision upon the earlier statute are that it can never be for the public benefit that an offence against public order should be committed, and that in regard to this matter, the truth or falsehood of a writing, published with the intention of committing such an offence, is irrelevant. It was otherwise in the case of a defamatory libel. It was obviously unjust that a defendant should be held responsible in a criminal proceeding for a defamatory writing which was true, and therefore afforded no ground of civil action. Its publication, so far from being injurious to the peace of the realm, might be for the public benefit. In such a case there is neither injury to an individual, nor an offence against the peace of the realm. Hence Lord Campbell's Act.

It was afterwards considered desirable to afford protection to the press in respect of a fair and accurate newspaper report of certain proceedings of public concern, unless the publication was malicious, or the report offended against public order by containing blasphemous or indecent matter. But here again, matter which is not for the public benefit is expressly excluded from the protection of the Act, and the observations of Blackburne, C.J., in *Reg.* v. *Duffy* (1), that no person can assert that it is for the public benefit to publish seditious matter, are equally applicable to both statutes.

I now proceed to consider whether the offence charged in the information is seditious libel. In order that this should be so, it is essential that the defendant should be charged with an inten-

(1) 9 Ir. L. R. 329. (2) 12 L. R. Ir. 29.

tion of the kind known to the law as "seditious." In the language of Mr. Archbold, in his observations on the form of indictment for that offence—"besides setting out the libellous passages of the publication, the indictment should also contain such averments and innuendoes as may be necessary to render it intelligible, and its application to the Queen or Her Government, &c., evident." There is no authority for the proposition that the word "seditiously" need be used. There is no general principle of criminal pleading requiring the technical name of the offence to be introduced into the indictment. It is necessary in certain cases; but in others the indictment simply states the essence of the offence. An instance of an indictment for seditious libel has been referred to in which the word "seditiously" does not occur, and the adequacy of an information in such a form is recognised by Grose, J., in the opening words of his charge to the jury, in which he refers to the indictment as charging the defendants with publishing the libels "with intent to bring into contempt the administration of the justice of the country, and to defame, vilify, and degrade the Lord Chief Justice of the King's Bench": *Reg.* v. *Hart* (1).

Probably none of the attempts which have been made to define a seditious intention, or rather to enumerate various kinds of intention which the law regards as seditious, are completely satisfactory or exhaustive. But it is clear that an intention to bring the administration of justice into hatred or contempt amounts to such an intention. The intention is, in each instance, something different from the defamatory writing. The character of the writing may be strong, and in some cases irresistible, evidence of the existence of an intention to bring the administration of justice into contempt. In other cases a jury might fairly believe that a charge was brought, against persons engaged in the conduct of a trial, for the purpose, not of vilifying, but of purifying, the administration of justice. In such a case the defendant ought to be acquitted, because the intention, which is the essential part of the offence, was not proved as charged.

I agree with Mr. Macinerney that a defendant charged with

(1) 30 State Trials, 1315.

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libel is entitled to be clearly informed by the indictment or information whether he is charged with defamatory or seditious libel. I therefore turn to the information to see whether it contains a clear charge of intention of such a character as will constitute the latter offence. I find that the first count of the information charges the defendant with "wickedly and maliciously contriving and intending to bring the administration of justice into contempt." Herein consists the sedition, and words could not more accurately describe the intention which constitutes the offence. The count goes on to charge the defendant with scandalizing and vilifying the Judge and jurors, and sets out the words upon which this charge is founded. Herein consists the libel. The same elements are contained in each of the succeeding counts, and, taken together, they charge the defendant in clear and unmistakable language with the offence known as seditious libel. Whether the writings which form the subject-matter of the information were published with this intention, will be, in this as in every case, a question for the jury. But, so far as the question of pleading is concerned, I am clearly of opinion that the offence charged in the information is seditious, not defamatory, libel; and, as I am also of opinion that a justification cannot be pleaded when this offence is charged, I agree that the demurrer should be allowed.

It was accordingly ordered that the demurrer be allowed, and the pleas in question struck out.

Solicitor for the Crown: *Sir P. Coll.*
Solicitor for the defendant: *John Tarrant.*

A. E. R. J.

LAWLER, COMPLAINANT; P. & H. EGAN, LIMITED, DEFENDANTS (1).

K. B. Div. 1901. May 7, 9.

Sale of Poisons (Ireland) Act, 1870 (33 & 34 *Vict.* c. 26), *s.* 2—*Sale of a poison (not labelled as such) by a limited liability company—Common informer.*

The prohibition against the sale of poisons, as to which certain precautions are not observed, contained in the Sale of Poisons (Ireland) Act, 1870 (33 & 34 Vict. c. 26), s. 2, is general, and applies to bodies corporate as well as to individuals.

A common informer is entitled to prosecute for noncompliance with the provisions of this section.

CASE STATED by Justices pursuant to 20 & 21 Vict. c. 43, upon a summons at the suit of M. Lawler, an acting sergeant in the Royal Irish Constabulary and *ex-officio* inspector of weights and measures, against the defendants P. and H. Egan, Limited, for selling "corrosive sublimate of mercury" in a wrapper or cover, "such wrapper or cover not being distinctly labelled with the name of the article and with the word 'poison,' and the name and address of the seller, contrary to 33 & 34 Vict. c. 26, s. 2." Lawler instituted the proceeding by the written instructions and on behalf of the Pharmaceutical Society of Ireland. By consent the case was heard by the resident magistrate, sitting alone.

The defendants contended at Petty Sessions—1, that the prosecution should have been in the name of the Pharmaceutical Society, that Lawler was a common informer, and as such not entitled to prosecute; and, 2, that the Sale of Poisons (Ireland) Act, 1870, must be read with the Pharmacy (Ireland) Act, 1875, and that this limited company were not in law a "person" within the meaning of these statutes; citing *The Pharmaceutical Society of Ireland* v. *Boyd & Company* (2), and *The Pharmaceutical Society* v. *London, &c. Supply Association* (3).

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.
(2) [1896] 2 I. R. 394. (3) 5 App. Cas. 857.

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The Bench held that a limited company could neither know nor be introduced to a purchaser of poison; that hence the Poisons Act was never meant to apply to such companies; and that thus, on the authority of *Boyd's Case* (1), the prosecution should be dismissed.

On the argument upon the case stated it was conceded at the bar that, having regard to the decision in *Kenealy* v. *O'Keefe* (2), it was impossible to contend that Lawler as a common informer was not entitled to prosecute, and that the only point open to discussion was whether an incorporated company came within section 2 of the Sale of Poisons (Ireland) Act, 1870.

J. Day and *Gordon, K.C.*, for the appellant, contended that the observations of Lord Selborne, C., and Lord Blackburn in *The Pharmaceutical Society* v. *London, &c. Supply Association* (3) upon section 17 of the English Pharmacy Act of 1868 (31 & 32 Vict. c. 121) (corresponding to section 2 of the Sale of Poisons (Ireland) Act, 1870), governed the present case; that the general words of section 2 could not be restricted so as not to include bodies corporate; and that the reasoning in *Boyd's Case* (1) upon different words in a different statute could not be successfully relied on.

Fetherstonhaugh, K.C., and *Denning* for the defendant company, the respondents, urged that the actual seller (who in this case had been convicted and fined), was the person aimed at in the section; he relied upon *Boyd's Case* (1), and submitted that the *dicta* in *The Pharmaceutical Society* v. *London, &c. Supply Association* (3) were not necessary to the decision of that case, and therefore not necessarily binding upon the Court, and that the Court should follow their previous decision in *Boyd's Case* (1).

Cur. adv. vult.

May 9. The judgment of the Court was delivered by—

ANDREWS, J.:—

This was a prosecution in which the defendants, an incorporated company, were charged at the Tullamore Petty Sessions with

(1) [1896] 2 Ir. R. 394. (2) [1901] 2 Ir. R. 39. (3) 5 App. Cas. 857.

having sold a poison called corrosive sublimate in a cover which was not labelled with the word "poison," and with the name and address of the seller, contrary to the 2nd section of the Sale of Poisons (Ireland) Act, 1870 (33 & 34 Vict. c. 26). That section enacts "That it shall be unlawful" to make such a sale, or to sell any of the poisons included in the first part of schedule A to the Act, to any person unknown to the seller, unless introduced as therein mentioned, and provides that, on every such sale the seller shall make, or cause to be made, the therein specified entry in a book kept for the purpose, and renders any person selling poison otherwise than is therein provided liable to the penalties therein mentioned, and enacts that for the purposes of that section the person on whose behalf the sale is made by an apprentice, or servant, shall be deemed to be the seller. Certain exemptions are made from these provisions of the section which do not apply to this case.

The sale in question with which the defendants were charged was made by one Delaney, a servant of the defendants, on their behalf, for which he was convicted under section 30 of the Pharmacy Act (Ireland), 1875 (38 & 39 Vict. c. 57), which makes it unlawful for any person to sell such a poison unless registered as a pharmaceutical chemist, which is a different offence from the offence prohibited by the 2nd section of the Act of 1870.

In the present case the parties consented to accept the decision of the resident magistrate alone on the charge against the defendants, which he dismissed, holding that the defendants as an incorporated company were not within the 2nd section of the Act of 1870, under which the charge against them was brought. On a case stated at the instance of the complainant this was the only question argued before us, an objection to the right of the complainant to prosecute having been abandoned. The Irish case of *The Pharmaceutical Society of Ireland* v. *Boyd & Company* (1) was a decision on section 30 of the Act of 1875; and the English case of *The Pharmaceutical Society* v. *The London and Provincial Supply Association* (2) was a decision on the 1st and 15th sections of the English Act, 31 & 32 Vict. c. 121, corresponding with section 30

(1) [1896] 2 I. R. 394. (2) 5 App. Cas. 857.

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of the Irish Act of 1875. These cases are not decisions upon, and do not apply to, the 2nd section of the Irish Act of 1870, with which we have to deal in the present case. Section 17 of the English Act, 31 & 32 Vict. c. 121, corresponds with the 2nd section of the Irish Act of 1870; and, in giving judgment in the House of Lords in the English case above referred to, Lord Selborne, then Lord Chancellor, in dealing with the English Act, said (pp. 864–5 of the report), "My Lords, if you look through the Act it will be found that there is only one place where it seems to be necessary to put upon the word 'person' a wider sense" (viz. than that of a natural person), "and that occurs in a clause which is in several respects contrasted with the rest of the provisions of the Act, I mean the 17th section. It begins with a general prohibition, in unequivocal terms, . . . 'it shall be unlawful to sell,' unlawful generally, absolutely, and unequivocally, 'to sell any poison by wholesale or retail,' as to which certain precautions are not observed. That form of prohibition is repeated twice . . . (The second time) 'it shall be unlawful to sell' to any person unknown to the seller, &c. That is a universal prohibition not qualified by any exception as to any description of person . . . The thing being made universally unlawful, 'person' must I think there include a corporation, if the sale is made by any apprentice, or servant, on behalf of a corporation." In this opinion Lord Blackburn (p. 873 of the report) concurred, and Lord Watson, the only other Law Lord present, expressed no dissent from it. Lord Selborne's construction of section 17, concurred in by Lord Blackburn, is no doubt a *dictum* which was not absolutely necessary for the decision of the case then before the House of Lords, but it is a considered opinion, with reasons assigned, and is entitled to great weight.

We agree both in the construction so given to section 17 of the English Act, and in the reasoning on which it is grounded, and of course we construe the 2nd section, which is the corresponding section of the Irish Act of 1870 in the same way. One of the difficulties in so construing the English Act does not apply to the Irish Act. In the English Act the construction in question places a different meaning on the word "person" in the 17th section from the meaning given to the same word in the

other sections of the English Act. In the Irish Act of 1870, which is, in this respect, an independent Act, no such difficulty exists; and Lord Selborne's reasoning, when applied to the 2nd section of the Irish Act, appears to us to be conclusive.

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We therefore decide that the defendants, although incorporated, come within that section, and that the magistrate was not correct in point of law in his determination. We accordingly quash the dismiss he pronounced, and remit the prosecution to the Petty Sessions Court to enter continuances and to proceed thereon, according to law, having regard to our decision, and to impose on the defendants such penalty as that Court shall deem just and proper under the circumstances of the case.

I have the authority of my Lord Chief Justice for saying that he concurs in the judgment I have just read. Under the circumstances we give no costs in either of these two cases—one of which was not capable of being sustained on behalf of the complainant, while the other has now been decided in his favour.

Solicitors for appellant: *Casey & Clay.*
Solicitors for respondents: *Hoey & Denning.*

A. E. Ñ. J.

HALPIN, APPELLANT; RICE, RESPONDENT (1).

K. B. Div. 1901. Feb. 20, 26.

Justices of the Peace—Sureties for good behaviour—Inadmissibility of evidence —Rebutting complaint.

On a complaint at Petty Sessions, requiring a person to find sureties for good behaviour, the same rule obtains as in applications requiring sureties to keep the peace, viz. that evidence is not admissible for the purpose of rebutting the evidence given in support of the complaint.

This rule applies, although the summons alleges as its ground facts amounting to a charge of a criminal offence.

CASE STATED by the justices of county Clare. At a Petty Sessions Court, held at Ennis on the 23rd and 24th November, 1900, the appellant was charged on a summons as follows: "That

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and BOYD, JJ.

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you the defendant on the 10th day of September, 1900, at Ennis, in the county of Clare, being a member of the County Council of said county, and then present at a meeting of that body in the Courthouse Ennis, which was being held for the transaction of business of the Council and a part of which business on that day was to open tenders and to declare contracts for the repairs and maintenance of roads in said county, certain persons being also present who had tendered for the repairs of said roads, for the purpose of entering into contracts and signing their bonds accordingly, did by your acts, language, and demeanour unlawfully use intimidation to and towards such last mentioned persons, and did cause apprehension and fear in the minds of such persons or some of them by the violence of your conduct on the occasion, and did by such acts, language, and demeanour cause the said persons or some of them to abstain from signing their bonds as contractors for the repair of such roads as they had tendered for to said Council; and did thereby cause such persons, or some of them, injury and loss, and did excite discontent in the minds of Her Majesty's subjects. This is to command you to appear as a defendant at the hearing of the said complaint at the Courthouse at Ennis, on Friday, 23rd November, 1900, at 12 o'clock noon, before such Justices as shall be there, and to show cause, if any, why you should not be bound over to keep the peace and be of good behaviour."

At the hearing of the complaint evidence was given, which satisfied the justices that the appellant on the occasion in question had used intimidation of the character and with the result charged.

It was contended on behalf of the appellant that he was entitled to adduce, and the justices were bound to receive, evidence rebutting or tending to rebut the evidence given in support of the complaint.

It was further contended on the part of the appellant that, whether he acted in the manner set out above (which, however, he did not admit), yet if he did, such conduct did not in itself constitute such misbehaviour on his part as would justify the magistrate in binding him to be of good behaviour, and further that he being a member of the County Council of Clare, was, as

such, justified in saying and doing there what he saw fit, in order to secure that the roads of the county should, as he desired, be kept in repair by direct labour and not by contract, and that as such member he was entitled to act as he had done at said meeting.

The justices being of opinion that such evidence was not properly admissible, as the defendant was not entitled to go into evidence at all, refused to admit the same, and being further of opinion that the conduct of the appellant, as appearing from the evidence adduced by the complainant, constituted such misbehaviour as entitled them to bind him to be of good behaviour, and being further of opinion that his position as a county councillor did not justify his conduct at said meeting, which was rather contrary to his duty as such councillor, decided that he should enter into sureties, himself in £50 and two sureties in £25 each, to be of good behaviour towards all Her Majesty's subjects for a period of twelve months, and in default of so doing be imprisoned in Limerick jail for a period of two calendar months.

The present case was stated on the application of the appellant to obtain the judgment of the Court as to whether the justices were correct in point of law in their determination or as to what should be done in the premises.

Moriarty (with him *Bushe*, *K.C.*), for the appellant:—

We rely on two points:—1st. The facts set out in the summons charge the appellant with a criminal offence, and the magistrates were therefore bound to dispose of that charge before making an order to enter into sureties: Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 21. No doubt the summons only asks to have the defendant bound over, but, having appeared, he could have been convicted of the offence charged: *Kennington* v. *Daniel* (1). The offence, moreover, is one within sect. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86); the defendant in such case has a right to object to be tried by a Court of Summary Jurisdiction (sect. 9), and the magistrates are bound to inform him of such right: *Reg.* v. *Cockshott* (2). To

(1) 22 L. R. Ir. 667. (2) [1898] 1 Q. B. 582.

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hold that the magistrates had power to make the present order would be to defeat the policy of that Act.

2nd. Admitting that in applications for surety of the peace evidence is not admissible on behalf of the defendant, yet in applications for surety for good behaviour the rule is different: *Reg.* (*Feehan*) v. *The Justices of Queen's Co.* (1), *per* May, C. J.; *Reg.* (*Orr*) v. *The Justices of Londonderry* (2); *Reg.* (*Reynolds*) v. *The Justices of Cork* (3); Dalton's Justice of the Peace, p. 293 (ed. 1715); Humphrey's Justice of the Peace, p. 473*n* (9th ed.). In *Ex parte Seymour* v. *Davitt* (4) such evidence was actually received by the Queen's Bench Division. In England express provision is made by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 25, for the admission of evidence on behalf of a defendant against whom surety of the peace or for good behaviour is sought with respect to a private complainant. No provision is made where surety is sought on behalf of the Crown for the peace and good behaviour generally, the reason being, it is submitted, that in the latter case such evidence was admissible under the existing law. Section 20 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 33), is wide enough to cover the present case.

The Solicitor-General (*Wright, K. C.*), and *Morphy*, for the respondent:—

As to the first point:—In *Reg.* (*Reynolds*) v. *The Justices of Cork* (3); *Reg.* (*Feehan*) v. *The Justices of Queen's Co.* (1); *Ex parte Seymour* v. *Davitt* (4): a criminal offence was in each case charged.

As to the second point, we should not be sorry if the Court found itself able to decide in favour of the contention of the appellant that in applications for surety for good behaviour evidence is admissible on behalf of the defendant. We submit, however, that as the law stands such evidence is not admissible. There is no distinction in principle between surety for good behaviour and surety of the peace. In cases of surety of the peace it is well

(1) 10 L. R. Ir. 294, 300.
(2) 28 L. R. Ir. 440.
(3) 10 L. R. Ir. 1.
(4 12 L. R. Ir. 46.

settled that the defendant cannot adduce evidence: *Lord Vane's Case* (1); *Rex* v. *Stanhope* (2); *Reg.* v. *Dunn* (3); *Rex* v. *Doherty* (4), *Reg.* v. *Mallinson* (5); *Lort* v. *Hutton* (6); 5 Burn's Justice of the Peace, p. 749. The true reason of the rule is that binding over to the peace is not in the nature of punishment, but only a precautionary measure: *Lort* v. *Hutton* (6); *Ex parte Davis* (7); *Ex parte Harken* (8). This reason applies with equal force to surety for good behaviour. *Ex parte Tanner* (9) is an express decision of the Exchequer Division on the point; that was a case of surety for good behaviour. The dictum of May, C.J., in *Reg.* (*Feehan*) v. *The Justices of Queen's Co.* (10) cannot be supported. [GIBSON, J., referred to Nun and Walsh on the office of Justice of the Peace, p. 531, ed. 1841; *In re Pollard* (11).]

Bushe, K. C., in reply:—

The dictum of May, C.J., was founded on an examination of all the authorities. *Ex parte Tanner* (9) is distinguishable since there a contempt was committed in face of the Court. In any event since no appeal lay from that decision it is not binding on this Court: *In re Heaphy* (12). The real reason for excluding evidence on behalf of the defendant in applications for surety of the peace is that suggested by Burns, viz. that a person demanding sureties of the peace swears only to his own apprehension, of which no other person can form an adequate judgment (5 Burn's Justice of the Peace, p. 749). This reasoning has no application to cases of surety for good behaviour.

Cur. adv. vult.

(1) 2 Str. 1202.
(2) 12 A. & E. 620.
(3) *Ib.* 599.
(4) 13 East, 171.
(5) 16 Q. B. 367.
(6) 45 L. J. (N. S.) M. C. 95.
(7) 24 L. T. (N. S.) 547.
(8) 24 L. R. Ir. 427.
(9) Judgments of Superior Courts, Ireland, 340.
(10) 10 L. R. Ir. 300.
(11) L. R. 2 P. C. 106.
(12) 22 L. R. Ir. 500.

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LORD O'BRIEN, L.C.J.:—

We reserved judgment in this case, as it involved a question of considerable importance as regards the procedure and rights of defendants where sureties for good behaviour are demanded, and inasmuch also as there is to some extent a conflict of judicial opinion in this country with reference to the question which has been debated.

The principal question before us is whether, when sureties for good behaviour are demanded, the defendant, or witnesses on his behalf, can be examined, to testify in his favour. It is conceded that such witnesses are not competent when sureties for the peace are demanded. Does a like rule obtain when the demand is not for sureties of the peace, but sureties for good behaviour? We think that the same rule does prevail and that the decision of the Court of Exchequer, in *Dr. Tanner's Case* (1) is right and should be followed. We all, however, think that the law should be amended, so as to make in such cases the defendant and any person desirous to testify in his favour competent witnesses. The rule which excludes witnesses for the defence on a procedure for sureties for the peace and for good behaviour, obtained in England down to the year 1879, and was not abrogated until the passing of the Summary Jurisdiction Act (42 & 43 Vict. c. 49) in that year. No such enabling Act was passed for this country, nor is there any provision in our Summary Jurisdiction Act, or in the Petty Sessions Act, at all equivalent to the 25th section of the English Summary Jurisdiction Act of 1879; and as it may with much reason be contended that the latter Act does not apply when questions for good behaviour or of the peace are sought on behalf of the Crown, it should be made plain by any amending Act that may be passed that the defendant and his witnesses are competent to be examined in such case. The suggestion that the English Summary Jurisdiction Act, s. 25, only regulated the procedure applicable to an existing state of the law cannot, in my opinion, at all prevail. It clearly changed the law as to sureties of the peace, enabling witnesses for the defence to be competent witnesses in that case—a privilege which beyond all question did not exist before; nor can I at all adopt the suggestion

(1) Judgments of Superior Courts, Ireland, 340.

that the 25th section of the English Summary Jurisdiction Act afforded an argument in support of the contention that the disability as to the examination of witnesses for the defence was confined to the cases where a private individual was complainant. If, in the case of a complaint put forward by a private person, witnesses for the defence were not examinable, *a multo fortiori* one would say they were not competent when the complaint was put forward on behalf of the king. But let me come to the reasoning on which the judgment in *Dr. Tanner's Case* (1) was founded. Why did the Court of Exchequer hold that Dr. Tanner, when required by the magistrates to give sureties for good behaviour, was not entitled to be heard on his own behalf? On this ground and on no other—that, in the eye of the law, binding to good behaviour was not punishment but a precautionary proceeding against misbehaviour. This was the basis of the decision—the very ground assigned by Lord Blackburn in *Lort* v. *Hutton* (2) for the non-admissibility of witnesses for the defence in that case. No doubt that case was one in which articles of the peace were exhibited, but like reason like rule. If in the case of a demand for sureties of the peace witnesses for the defence are not admissible because the proceeding is not punitive but precautionary, so also witnesses for the defence should not be admissible in the case of sureties for good behaviour, because in this case, as in the former, the proceeding is not punitive, but precautionary. In the case of *Lort* v. *Hutton* (2) Lord Blackburn did not assign as the basis of his opinion that in a proceeding for sureties of the peace the law looks with special care to the subjective condition of the applicant, that it investigated whether apprehension of a breach of the peace existed in the mind of the person who exhibited the articles of the peace or that the recognisance was originally of *ad interim* character, binding to the peace up to a particular session or from sessions to sessions. The basis of Lord Blackburn's opinion was that the proceeding was not punitive, but precautionary. He looked to the object for which sureties for the peace were sought, which is the identical object with which they are sought when sureties for good behaviour are demanded, and seeing that the object was not punishment

(1) Judgments of Superior Courts, Ireland, 340. (2) 45 L.J. (N.S.) M.C. 95.

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for the commission of crime, but as a prevention against misbehaviour, he held that evidence on behalf of the defendant was not admissible.

Commenting upon the case of *Lort* v. *Hutton* (1) the Chief Baron said, "Lord Blackburn laid down that when a man was called upon to find sureties a witness could not be produced for the purpose of disproving the fact sworn to in support of the application, and when it was argued that such a decision was manifestly liable to abuse, and was against the principle that a man should always be heard in his own defence, the only answer that great Judge could give was, 'That argument would be irresistible if this were a case of punishment, but it is not—it is not in the nature of punishment, but is to prevent the apprehended danger of a breach of the peace being committed.'" "I am bound," said the Chief Baron, "by law. It is no new law. It has been laid down by Lord Blackburn within the last few years, but the same principle is asserted in every text-book, and every decision of our Courts for the last 300 years; and it would be pedantic to cite authorities in proof of it. . . . I regret extremely that the law is so. I regretted being obliged in *Harken's Case*, to hold that that was not punishment, which I knew and felt was punishment, and would operate as punishment; but I repeat what I have already said so often, that I find such is the law; and if this, which I venture to say is an anomaly in our law, is to cease to exist, it must be by the act of the Legislature, and not by the act of this Court" (2). This was the opinion not alone of the Lord Chief Baron, but was the opinion also of Baron Dowse and Mr. Justice Andrews; and it rested upon the authority of that great lawyer, Lord Blackburn, whose judgments are one of the great inheritances of our law.

But Mr. Bushe and Mr. Moriarty argued that as there could be no appeal from the judgment of the Exchequer in *Dr. Tanner's Case* (3), we were not bound by it, and that it was not well decided, and that we accordingly should not follow it. The main grounds of impeachment were that it was not in accordance with the

(1) 45 L. J. (N. S.) M. C. 95.
(2) Judgments of Superior Courts in Ireland, 360, 361.
(3) *Ibid.* 340.

opinion of Chief Justice May in *The Queen* (*Feehan*) v. *Justices of Queen's Co.* (1); that it was inconsistent with what was done in this Court in *Ex parte Seymour* v. *Davitt* (2), where an affidavit by one of the persons sought to be bound, namely, P. J. Quinn, was allowed to be referred to; that it is also inconsistent with a passage in Dalton's well known work; and further, on this ground, that the Lord Chief Baron in his judgment took no distinction between articles of the peace and an application for sureties for good behaviour.

Now, no doubt Chief Justice May did express an opinion in *The Queen* (*Feehan*) v. *Justices of Queen's Co.* (1), that evidence on behalf of the defendant was admissible in the case of an application for sureties for good behaviour, and stated that the cases relied upon were conversant only with articles of the peace, but this was all he said. He did not investigate the reason why sureties for the defence were not admissible in the case of a demand for sureties of the peace, nor did he refer to the basis of Lord Blackburn's decision which applied quite as much to an application for sureties for good behaviour, as to an application for sureties for the peace. Besides, it must be remembered that Chief Justice May's opinion was not necessary for the decision of the case before him, and was, therefore, a mere *dictum*, and it did not receive any sanction from anything Lord FitzGerald or Lord Justice Barry said, who formed part of the Court on the occasion. As to the admission of the affidavit of P. J. Quinn in the case of *Ex parte Seymour* v. *Davitt and others* (2), that manifestly took place *sub silentio*, the point as to its inadmissibility not having been taken by those who represented the Crown as was noted by the careful reporter. Of course, if the point had been taken, the Court should have followed their own ruling made shortly before in *The Queen* (*Feehan*) v. *Justice of Queen's Co.* (1), where the Rev. Mr. Feehan's evidence was held inadmissible. The passage in Dalton which has been referred to is interesting. It refers to barrators, common quarrellers, common breakers of the peace, rioters, those who frequent houses of bawdrey, and many others; and speaking of these the writer says: "that these

(1) 10 L. R. Ir. 294, 300. (2) 12 L. R. Ir. 46.

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former offenders and the like are evil members of the Commonwealth, and therefore it seemeth reasonable, and just, and expedient that the justices of the peace in their discretion should convent such persons before them, and examine them and their courses of life, and if they cannot yield a good reason and account of such their courses, then to bind them to good behaviour" (Dalton, Justice of the Peace, 293, ed. 1715). This is the passage to which Mr. Bushe referred. The words of the writer are that "*it seemeth reasonable and just* that justices should convent, etc." It is not a statement of the actual law, it is no more than an expression of opinion; it does not at all necessarily involve that these from whom sureties for good behaviour were demanded could compel the justices to hear them, and, indeed, I think I may add that if there was any such assumption of authority in the present day on the part of a justice of the peace to "convent" members of the public at large, and examine as to the courses of their lives, such an inquisitorial pretension would be very summarily dealt with, and would receive no sanction from the law as administered in modern times.

As to the distinction between articles of the peace and sureties for good behaviour, no doubt the Chief Baron did not expressly deal with it in his judgment, but the case before him was one where sureties for good behaviour were demanded, and he treated demands for sureties for the peace and sureties for good behaviour as analogous, and seeing that the object of sureties for the peace and sureties for good behaviour was identical, he applied to the latter case the reasoning which in the former case established the incompetence of witnesses for the defence. Now we were glad to have the assistance of the Solicitor-General in the present discussion. He and his colleague did not press for a decision excluding the evidence of the defendant and of his witnesses, they merely brought the decided cases and the statements as to the law in the text-books before us, and, indeed, seemed to me to be personally desirous to have a decision come to in favour of the defendant, but I take advantage of the Solicitor-General's presence to say that in our view the law should be amended so as to provide that in all cases, whether the application for sureties for good behaviour or for the peace be made on behalf of the

king, directly or impliedly, or on behalf of a private individual, the person or persons against whom sureties are sought, as well as all who are ready and willing to testify in their favour, should be competent witnesses.

Another point pressed by Mr. Moriarty was that the facts alleged in the summons amount to a charge of a criminal offence within the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86, s. 7), and that the magistrates were bound therefore to dispose of the case by a decision of either guilty or not guilty. This argument is founded on a fallacy. The defendant here was not charged with a criminal offence with a view to punishment; what was sought was not that he should be punished, but that he should give surety as a precautionary measure against future misbehaviour. In the cases which have been cited of *The Queen* (*Feehan*) v. *Justices of Queen's County* (1), *The Queen* (*Reynolds*) v. *Justices of County Cork* (2), and *Ex. parte Seymour* v. *Davitt* (3), the facts charged amounted to criminal offences. These cases make it plain that where surety for good behaviour is sought the circumstance that the facts alleged amount to a charge of a criminal offence is no reason why such surety should not be required.

We must answer that the magistrates were right. At the same time we indicate our opinion to the authorities that a short Act of Parliament should be introduced to alter the law.

GIBSON, J.:—

The Court has now to make its choice between the opinion of May, C.J., that evidence on behalf of a defendant, against whom security for good behaviour is sought, is admissible, and the decision of the Exchequer Division, that it is not. In the centuries that have elapsed since this jurisdiction has been first used there is no trace of any actual decision up to *Dr. Tanner's Case* (4). The view of May, C.J., is recommended by common sense and natural justice, with which the law ought to accord. But we can only declare

(1) 10 L. R. Ir. 294.
(2) *Ibid.* 1.
(3) 12 L. R. Ir. 46.
(4) Judgments of Superior Courts, Ireland, 340.

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law; we cannot make it. I have carefully examined the various books on the subject, and the cases relating to security of the peace and good behaviour, with the result that I now proceed to state.

The necessity of preserving the king's peace was the origin of security for the peace and good behaviour, as it was of the ancient frank pledge. The two forms of security are closely akin. According to Dalton persons could in the discretion of the justice be bound to the peace—1, who broke, or whose conduct menaced, the peace in the justice's presence, whether in or out of Court; 2, who were barrators to his knowledge; 3, who were brought before him by a constable for breach of the peace committed in such constable's presence; 4, who had violated a recognisance of the peace; or 5, against whom the peace was sworn by a person in apprehension of violence. The jurisdiction in practice is now much less extensive, being exercised only in the last case, or in connexion with a judicial proceeding before the tribunal which requires the security. In its origin it would seem that a justice might, especially in a matter within his personal cognisance, make the order *ex parte*, and entrust the execution of the order to a constable. Where the writ of *supplicavit* or *de securitate pacis* was procured from the Chancery or the King's Bench—on an apparently *ex parte* application—the function of the justices in carrying out such writ was purely ministerial (Fitzherbert, N. B. 80). The inference is strong that, if the writ could be issued without notice to the party affected, no evidence on his behalf would be admissible. The action of the Court, like that of a grand jury, depended on a *prima facie* case being made out.

Security for good behaviour comprehended security for the peace, but was much more comprehensive, extending to ill fame and misbehaviour of a character which, though not criminal, was likely to be dangerous to the peace and order of the community, including words disparaging and insulting magistrates, or lewdness of life: *Clayton's Case* (1). The dangerously elastic nature of the jurisdiction, now to a great extent obsolete; the fact that the application was usually (though not necessarily) made at Sessions,

(1) 12 Mod. 566.

or, if out of Sessions, before two or more justices, while peace applications were commonly made to a single justice; and, above all, the express recommendation of Dalton that the party to be bound should be examined by the justices, distinguish security for good behaviour from security for the peace. It is, however, to be noted that the same kind of mandatory writ could be issued from Chancery or the King's Bench. Such writ took away all discretion from the justices; and as it could be obtained *ex parte* it supplies, as to the incompetence of evidence, a similar argument to that already referred to in reference to security for the peace. At first I was inclined to think that the advice to examine the defendant supported the admissibility of the evidence; but on further consideration I do not think so. The examination (which is counselled not as indispensable, but as a matter of judicial prudence) was plainly not on oath, and it is not suggested that witnesses could be called for the defendant. At the time Dalton wrote, the justice was required by statute in felony cases, like a French Juge d'Instruction, to examine accused persons (Hale, P.C. 372, 585; Dalton, ed. 1635, c. 111, 112). This power of examination was not limited to felonies, as Dalton, chapter 24, as to Guns, shows. I incline to think that even in security for the peace cases a Justice as guardian of the peace could have formerly examined the defendant—particularly where the justice was proceeding on his own knowledge. The object of the examination was, I fear, too often not to establish innocence, but rather to make out guilt. In *Rudyard's Case* (1) the whole case against Rudyard was supplied by his own examination before the magistrate. The case, which was one of security for good behaviour, is of much historical as well as legal interest. This practice of examining the defendant is now happily unknown; and it has been decided that, the matter being criminal (*Hilton* v. *Byron* (2)), the defendant cannot be himself sworn as witness: *Feehan's Case* (3). For the above reasons, in seeking a solution of the present problem, no weight can be attached to the ancient power of interrogation existing in Dalton's time.

The procurement of writs in the metropolis, far away from the

(1) 2 Vent. 22. (2) 12 Mod. 243. (3) 12 L. R. Ir. 294.

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residence of the parties to be affected, became subject to abuse (Fitz Herbert N.B., 80); innocent persons were oppressed, while the guilty were screened by collusive process. This was probably the reason of passing the Act 21 James 1, c. 8, from which our Irish Act of Ch. 1 was copied. Under it all process of the peace and good behaviour at the suit or by the prosecution of anyone was made void unless granted on motion in open Court upon declaration in writing upon the corporal oath of the party desiring such process; if it afterwards appeared to the Court that the causes expressed in such writing were untrue, costs and damages might be awarded to the party aggrieved, and the party offending might be committed to prison until he paid such costs and damages.

Two things strike one on reading this statute. The applicant was to be a person who asks for the process for his own individual protection, and the two forms of process are linked together as identical. The same remedy for a false application is given in the case of process for good behaviour as for the peace; if the defendant in an application for good behaviour could have resisted the application by evidence, one would have expected some difference in the phraseology. The nature of the remedy suggested that the application could not be met by a substantive defence. The statute says nothing in express terms as to giving the party to be bound notice of the application.

The writ of *supplicavit* was not extinguished by the statute, but it gradually fell into disuse. The last reported case where the writ was granted was in 1723, in *Clavering's Case* (1), heard on a motion to discharge the Lord Chancellor's order, which had been obviously made *ex parte* without notice.

In 1743 in *Vane's Case* (2) it was formally decided that in an application for process of the peace under the statute the truth of the charges in the articles must be accepted till the contrary should appear in a proper prosecution; that is, I suppose, a prosecution for perjury (as in *Parnell's Case* (3)). The decision was rested on the settled practice of the Court, but no reason for that practice was suggested. This case was followed in *Rex* v. *Doherty* (4),

(1) 2 P. Wms. 202.
(2) 2 Strange, 1202; 13 East, 171.
(3) 2 Burr. 806.
(4) 13 East, 171.

also on articles under the statute. The same practice was followed at Sessions. The explanation given by Burn of this inadmissibility of evidence for the defendant is that the applicant swears only to his own apprehensions, of which no other person can form an adequate judgment. If this was the real reason of the rule it certainly does not apply to security for good behaviour. I cannot accept the suggested explanation. It is not mentioned in *Vane's Case* (1), and it does not adequately account for the rule. Fear of violence by itself did not justify an application for the peace. Facts had to be stated (*Reg.* v. *Dunn* (2)) to satisfy the Court. Why was not the defendant allowed to dispute the evidence of the facts alleged against him? Again, where a constable applied for security for the peace on the ground of a breach of the peace occurring in his presence, the suggested explanation could hardly apply. The true reason is that given by Blackburn, J., in *Lort* v. *Hutton* (3), and accepted by Palles, C.B., viz. that the security was merely preventive justice, and in no way punishment. This reason it is obvious applies quite as much to security for good behaviour as to security for the peace.

Up to Modern Reports there are many good behaviour cases; in none does it appear that the defendant ever called evidence. In *Rudyard's Case* (4) the party was himself examined, but not of course on oath. Good behaviour might be required in addition to peace; and on an application for peace the Court could enjoin good behaviour (*Dennis* v. *Lane* (5)). In such a case could the defendant produce witnesses? Until the Court gave its decision, the case being up to that time one for peace only, no evidence could be given. The moment that the announcement was made that sureties for good behaviour would be required, would the defendant be able to disprove the applicant's case on the very same evidence? Suppose that, after a verdict of acquittal, a judge ordered security for good behaviour, would the accused person be at liberty to go into evidence? If the *dictum* of May, C. J., is right, possibly he might. In *Haylock* v. *Sparke* (6) the magistrate wrongly adjudicated as in a peace case

(1) 2 Str. 1202.
(2) 12 A. & E. 599.
(3) 45 L. J. (N. S.) M. C. 95.
(4) 2 Vent. 22.
(5) 6 Mod. 131.
(6) 1 E. & B. 471.

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when he only would have had jurisdiction for good behaviour. Lord Campbell held that he was protected in an action for false imprisonment. I am not certain that Lord Campbell would have used the language he did if there was such a radical difference as to defence between the two proceedings as is now urged.

For the last two centuries substantive applications at Sessions for good behaviour have been rare. The only direct authorities as to the law and practice that I have been able to discover are—1, the statement in Nun and Walsh's Justice of the Peace (1841 ed., p. 531), that though magistrates allow the defendant to examine witnesses such evidence is never admitted in the Superior Courts; 2, the view of the learned editor of Stephen's Blackstone, that articles of the peace and for good behaviour stand in the same position as to not being controvertible (Stephen's Blackstone, vol. iv., p. 373, Ed. 1863); 3, the Summary Jurisdiction Act 1879, section 25, which amends and supplies a weighty argument as to the previous law; 4, the decision of Palles, C.B., in *Dr. Tanner's Case* (1).

The origin and nature of the jurisdiction, the writs by which it was enforced, the statutes of James and Charles, and the absence of precedent, added to the above authorities, compel me unwillingly to decide that the present application, like an application for sureties for the peace, cannot be met by evidence on behalf of the defendant. The only semblance of authority the other way is the *dictum* of May, C.J., of which the other members of the Court expressed neither approval or disapproval. I cannot find that his view has ever been acted on in this Court. In *Quinn's Case* (2) though Quinn's affidavit was permitted to be read, it could not have been received as evidence, as he was the defendant, and was therefore an incompetent witness according to *Feehan's Case* (3).

The ground mainly pressed by Mr. Moriarty, viz. that the case was one of prosecution under the Conspiracy Act, as to which the defendant was entitled to prove his innocence, is not well founded. The case was not a prosecution, but was throughout an application for sureties for good behaviour. That the application

(1) Judgments of Superior Courts, Ireland, 340.

(2) 12 L. R. Ir. 46.

(3) 10 L. R. Ir. 294.

was grounded on an apparent violation of the criminal law does not (as the authorities prove) affect the nature of the jurisdiction.

It was suggested that the Petty Sessions Act gave the right to examine witnesses, as there was a "complaint." The Act relates to procedure and not the law of evidence. In a complaint applying for security for the peace, plainly no witnesses could be called for the defendant.

The result of this decision exhibits a most unfortunate condition of law. In England, section 25 of the Act of 1879 amends the law, though it does not extend to applications under the statute, in the King's Bench. From oversight the salutary provisions of the statute of 1879 have not been applied to this country. No reason can be advanced why the law here should be different. True it is that security for good behaviour is not penal; but it certainly imports an imputation on character, and it is a strange anomaly that, in reference to a charge which magistrates cannot try directly, they should be able by an indirect adjudication of *prima facie* guilt to impose an obligation to find sureties—an obligation which a defendant may be unable, as he often is unwilling, to discharge. Legislation is urgently demanded to remove what is not merely an anomaly, but a plain violation of the fundamental principles of justice. Whether on application for sureties for the peace or for good behaviour, the Court should hear both sides; and a defendant ought to have as good an opportunity of making and proving his case as the complainant.

MADDEN, J.:—

I do not dissent from the judgment of the Court in so far as it follows the decision in *Ex parte Tanner* (1), to the authority of which I yield. At the same time, I must say that a careful examination of the antecedent authorities has led me to adopt, as expressing my own view of the law, the following words of May, C.J., in *The Queen* (*Feehan*) v. *Justices of Queen's County* (2):— "Several cases were cited in argument as deciding that in cases of this nature" [that is in applications under 34 Ed. 3, c. 1, to bind a party to be of good behaviour] "evidence is not receivable to

(1) Judgments of Superior Courts, Ireland, 340. (2) 10 L. R. Ir. 294.

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contradict the evidence given by the prosecutor or applicant. On examination it will be found that these authorities have reference to articles to keep the peace, not to cases of sureties to be of good behaviour. In the latter class of cases it would seem that the traverser is entitled to disprove the matters with which he is charged" (1).

The distinction is, I think, a very real one. Section 25 of the English Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), applies to cases of a complaint by any person to have another person adjudged to enter into recognisance and find surety to keep the peace or to be of good behaviour towards such first-mentioned person, and provides that in such cases the defendant and witnesses may be called and examined. This section seems to me to apply only where Justices, on the application of an individual, bind persons to keep the peace and to be of good behaviour towards the complainant, in exercise of the jurisdiction which they possessed antecedently to, and independently of, the statute of Ed. 3. The section does not deal with cases in which the defendant is called on to find surety to be of good behaviour generally towards the king and his people, the reason being, I think, that in that class of case such evidence was admissible as the law then stood. In this view of the section it supports the opinion expressed by May, C.J., which is in accordance not only with justice but with the course of practice. For it appears from the statement in Nun and Walsh, 1841 ed., p. 531, to have been the practice at that time in Courts of Petty Sessions, to allow the defendant to examine witnesses to contradict the complainant's statements, in a proceeding under the statute of Ed. 3. No doubt the authors say that a different practice prevailed in the Superior Courts, but they give no authority for this statement, nor do I see how any such authority could exist, since I find it stated in *Ex parte Seymour* v. *Davitt* (2), that inquiry was made during the hearing of that case, and no instance could be found prior to that time of any application to bind to good behaviour ever having been made in the Superior Courts.

As, however, I am unable to find any substantial ground of

(1) 10 L. R. Ir. 300. (2) 12 L. R. Ir. at p. 49.

distinction between the decision of the Court of Exchequer in *Ex parte Tanner* (1) and the present case, it is probably better to follow that authority, leaving it to the Legislature to amend the law in this particular in the manner which has been suggested.

BOYD, J.:—

I concur in the judgments of the Lord Chief Justice and Mr. Justice Gibson.

Solicitor for the appellant: *Thomas Lynch.*
Solicitor for the respondent: *Sir Patrick Coll.*

J. G. T.

COSGRAVE *v.* THE NATIONAL TELEPHONE CO. (2).

(1901. No. 2438.)

Pleading—General Order XXII., R. 1—Defence—Question of title—Payment into Court.

In an action claiming damages for trespass and injury to a reversion the defendant, though claiming no interest in the premises, is not entitled to put in a defence both denying the plaintiff's title and paying money into Court.

ACTION for damages for injury to certain premises at No. 14, Ardee-street, Dublin, by reason of repeated trespass and negligence about the roof and walls by the defendant Company's workmen and servants, which acts were alleged to have resulted in the roof and gable-wall collapsing, and becoming a total wreck. The statement of claim alleged that the premises were held by the plaintiff under a lease dated the 29th September, 1853, for a term of sixty-one years then next ensuing, together with other premises at a yearly rent of £21. It further averred that the premises had been set by the plaintiff to certain tenants in the month of January, 1901, which tenants were in occupation at the time

(1) Judgments of Superior Courts, Ireland, 340.
(2) Before MADDEN, J.

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of the alleged trespass, and, in consequence of the alleged acts of trespass to the premises, certain tenants of the plaintiff were obliged to leave the premises, thus depriving the plaintiff of the rents and profits thereof. The defence traversed the following allegations in the statement of claim :—(*a*) that the lease was made and executed as alleged, (*b*) that the premises were in the occupation of tenants of the plaintiff at the time of the alleged trespass, and (*c*) that the house and premises in question were the plaintiff's; and after further paragraphs denying liability, pleaded a payment of £1 into Court as sufficient to satisfy and discharge the plaintiff's claim.

The plaintiff moved to have the paragraph of the defence, which pleaded the payment of money into Court, struck out as contrary to the provisions of General Order XXII., Rule 1.

Littledale, for the plaintiff, in support of the motion :—

Order XXII., Rule 1, which enables money to be lodged in Court with a defence denying liability, excepts certain cases, viz. : —"Actions or counterclaims for libel or slander, or where the defence raises questions of title to land or incorporeal hereditaments." Here the defence, by denying that the lease was executed, and that the premises were the plaintiff's, or in the occupation of her tenants, raises a question of title to lands which clearly brings the case within the exception in the rules, and the defendant cannot pay money into Court. [R. S. C. Eng., Order XXII., Rule 1; *Campbell* v. *M'Clelland* (1); *O'Donnell* v. *Callanan* (2); *Fleming* v. *Dollar* (3); and Order XXX. of the Rules of 1877, were referred to.]

Jefferson, for the defendants :—

The exception in Order XXII., Rule 1, only applies where questions of title are raised between parties to the action, with adverse claims to an interest in the premises. The defendants here claim no interest in the premises. If the defendants sought, or endeavoured to establish, an easement against the plaintiff,

(1) 20 L. R. Ir. 444, 449. (2) *Ibid.* (3) 23 Q. B. D. 388.

then such a question of title as that contemplated by the exception would arise. *Campbell* v. *M'Clelland* (1), and *O'Donnell* v. *Callanan* (2), were possessory actions, and differ in that respect from the present. [He cited *Wheeler* v. *United Telephone Company* (3), and *Goutard* v. *Carr* (4)].

MADDEN, J. :—

June 11.

This is an action brought to recover damages for an injury to the plaintiff's reversion in a certain house and premises, in the occupation of tenants at the time of the alleged trespass. The statement of claim alleges that the plaintiff holds the house in question under an indenture of lease dated the 29th of September, 1853, for the term of sixty-one years, and it states that the roof and gable of the house fell in, as the consequence of the defendants' wrongful act—a state of things which, if it existed in fact, would be necessarily injurious to the reversion.

The defendant traverses the allegation in the statement of claim that the house was the plaintiff's, and with his defence, denying liability to the plaintiff, he lodges in Court by way of further defence, the sum of £1, contending that he is at liberty to do so under Order XXII. Rule 1. That rule excepts from its operation "actions or counterclaims for libel or slander, *or where the defence raises questions of title to land or incorporeal hereditaments.*" The words in italics were not contained in the rule for which Order XXII. Rule 1, was substituted. But even under the former rule where an action was brought for the purpose of establishing a right to property, and not for the recovery of substantial damages, a defence denying the alleged right, and lodging money in Court by way of compensation for its violation, would be set aside as calculated to prevent or embarrass the decision of the question really at issue in the action: *Campbell* v. *M'Clelland* (1). The present is not such an action, and the defences pleaded would, I think, be good under the former rule. Mr. Littledale contends that the additional provision contained in Order XXII. must be taken to be something more than an embodiment of the decisions

(1) 20 L. R. Ir. 444, 449.
(2) *Ibid.*
(3) 13 Q. B. D. 597.
(4) *Ibid.* 598.

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upon the earlier rule, and that it applies in any case where a plaintiff is by the defence put upon proof of his title to land. Mr. Jefferson, on the other hand, contends that notwithstanding the generality of the words used, the exception only applies where the defence raises a question of title as between the parties to an action. I can find no such limitation in the language of the rule. In the present case although the parties are not adverse claimants to an interest in land, the plaintiff's case is founded upon an allegation of title, which she must prove, and which is traversed by the defendant. It may be that a traverse by the defendant, in a possessory action of trespass, of an allegation that the plaintiff is seised of lands for an estate in possession under a certain deed, would not come within the rule, the action being in substance one for damages, founded on actual possession, and not involving a question of title. But an action for injuries to a reversion is only sustainable on proof of the plaintiff's title to the reversion in question, and where such title is disputed, the case comes within the terms of the exception, which ought to be read and applied in their ordinary signification. The defendant can elect as to which portion of the defence is to be struck out. If he does not dispute the plaintiff's title, he can retain the plea of payment into Court.

Solicitor for the plaintiff: *T. E. Harford.*
Solicitors for the defendants: *V. B. Dillon & Co.*

J. L.

WILLIAMSON *v.* ROVER CYCLE COMPANY (1).

Appeal.
1901.
April 26, 27, 29, 30, May 16.

Sale of goods—Contract—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14—*Guarantee—Implied guarantee of fitness and of quality of materials and workmanship—Sale of specified article by its trade name—Negligence—Evidence*—Omnia præsumuntur contra spoliatorem—*Bicycle.*

The plaintiff purchased an 1896 Royal Rover from G., an agent of defendants in Belfast. The machine was described in the Company's catalogue (which the plaintiff read before purchasing), and was in accordance with the description in it. The catalogue contained an express guarantee excluding the guarantee implied by statute or otherwise as to quality or fitness, and guaranteeing that all precautions usual and reasonable had been taken to secure excellence of material and workmanship, and undertaking to make good at any time within a year any defects in these respects. The plaintiff used the machine constantly for over seven months in Belfast, when he took it to pieces and packed it up. The plaintiff then went to England, and after four months he had the bicycle sent over to him at Leeds, where he rode it constantly for two months, when, while riding it at a good pace along a good road for cycling, the steering-post of the machine broke just below the crown plate, the front wheel became detached, and the plaintiff was thrown and injured. After the accident the plaintiff had the machine examined by three persons, who all stated that the break was a clean one—not the result of a flaw, or defective materials or workmanship. The plaintiff sent the broken machine to the defendants "for inspection," when the defendants replaced the broken parts, and threw them away.

In an action for breach of contract in the sale of the bicycle, the plaintiff obtained a verdict for £120. On motion by the defendants to set aside the verdict and to enter judgment for them, the Queen's Bench Division (Palles, C.B., *diss.*) gave judgment for the defendants. On appeal:—

Held (affirming the decision of the Queen's Bench Division), (1) that the mere happening of the accident, and the fracture and appearance of the tube, were not evidence of the breach of the catalogue guarantee; and (2) (agreeing with the majority of the Queen's Bench) that as three of the plaintiff's witnesses had seen the broken pieces of the machine, the loss and non-production of these broken pieces did not make the defendants *spoliatores*, or shift upon them the burden of proof.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

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1901.
WILLIAMSON v. ROVER CYCLE CO.

APPEAL by the plaintiff from the judgment of the Queen's Bench Division dated the 16th February, 1900. The facts of the case are reported fully, *ante*, p. 189.

The Macdermot, K.C., Bates, K.C., and *J. F. Jefferson*, for the plaintiff.

Gordon, K. C., Campbell, K. C., and *Hume, K. C.*, for the defendants.

The arguments were substantially the same as in the Court below :—

May 16.

LORD ASHBOURNE, C. :—

This is an appeal from the Queen's Bench Division who decided (the Chief Baron dissenting) that the verdict should have been directed for the defendants.

The action was brought for breach of contract in relation to the sale of a bicycle to the plaintiff, and was tried before Mr. Justice Andrews and a special jury in Dublin. The facts of the case have been fully and clearly stated in the judgment of Mr. Justice Kenny, and for the purpose of my judgment it is only necessary to refer to them very shortly.

The plaintiff purchased an "1896 Royal Rover" bicycle from the Belfast agent of the defendant Company. The machine was described in the Company's catalogue, and was in accordance with its description therein. The catalogue contained an express guarantee, excluding "the guarantee implied by statute or otherwise as to quality or fitness." It contained the following express guarantee :—"We guarantee, subject to the conditions mentioned below, that all precautions which are usual and reasonable have been taken by us to secure excellence of materials and workmanship; and we undertake to make good at any time within a year any defects in these respects in our cycles. This guarantee does not apply to defects caused by wear and tear, misuse or neglect."

The plaintiff who was a trained and experienced cyclist, carefully examined the bicycle before purchasing, used it frequently for several months, and then took it to pieces and went to England. After some months he got over the bicycle to England, when he used it

again frequently for two months until the machine broke at the crown (the top of the steering-post or tube). After the accident the plaintiff had the machine examined by experts, when it appeared that the break was a clean one—not the result of a flaw or defect in materials or workmanship. The plaintiff sent the broken bicycle to the defendants for "inspection." The Company replaced the broken parts, and threw them away.

Under these circumstances the plaintiff instituted his action for damages, and the jury found everything for him. The defendants moved in the Queen's Bench Division that the verdict and findings of the jury, and the judgment entered thereon, be set aside, and judgment entered for the defendants, or for a new trial on the grounds of misdirection: that the findings were against evidence and the weight of evidence; and that there was no evidence proper to be left to the jury on the original or amended claim.

The arguments in the Queen's Bench Division, and here, practically turned on the meaning and effect of the catalogue guarantee above set out, whether there was any evidence of its breach, and whether there was anything in the special facts of the case to shift the *onus* of proof from the plaintiff to the defendants. The first and main question is therefore whether there was evidence to go to the jury that the contract in that guarantee was broken?

I can see nothing but the happening of the accident, and the suggestion that *res ipsa loquitur*, which the plaintiff can rely on to show any kind or form of negligence. Does it show any? If so, what is the form or kind of negligence? A clean break, a clean snap without flaw or blemish was all that appeared. I, therefore, on this first cardinal question agree with the three learned Judges of the Queen's Bench Division, that the mere happening of the accident and the fracture and appearance of the tube are not evidence of the breach of the quoted guarantee—which must be now the plaintiff's sole reliance. It might be otherwise if there were any facts which would shift the *onus* of proof—and instead of leaving the plaintiff to prove facts which would be evidence that the express contract of guarantee was broken, would require the defendants to prove that they had taken the

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precautions stipulated for to secure excellence of materials and workmanship. The majority of the Judges in the Queen's Bench Division could see nothing to cast the *onus* on the defendants, but the Lord Chief Baron thought that having thrown away the broken pieces of the bicycle, and not being in a position to produce them at the trial, the maxim applied *omnia præsumuntur contra spoliatorem*, and therefore the *onus* of proof was shifted. I cannot think that the throwing away of the broken pieces according to custom after repair could subject the defendants to this grave consequence. All the facts and circumstances have to be considered. If motive was necessary there is nothing to indicate that the defendants had the slightest intention of removing damaging evidence. There is nothing to show that the plaintiff was in any particular prejudiced; he was able to prove, and proved by ample evidence, the appearance of the break—that it was a clean break, without flaw—and unless to contradict all his evidence, it is difficult to see what effect could be gained by the production of the broken pieces. I agree with all the Queen's Bench Judges that the maxim *res ipsa loquitur* does not help the plaintiff, and I agree with the majority that the facts of the case negative the suggestion that the defendants can be regarded as *spoliatores*.

I therefore think that the appeal should be dismissed with costs. I do not regret the result, for I think it would be a grave disaster to this great trade if we lightly fixed liability on the vendors of a bicycle for something that happened to it over a year after it was purchased.

FITZ GIBBON, L. J.:—

I desire to add a few words, chiefly to state what I am *not* deciding. I do not differ from the Chief Baron, either as to his statement of the law, or as to its applicability, as stated, to the present case. But making every reasonable presumption against the defendants, and even assuming them to be "*spoliatores*"—though I am not prepared to say that they were—I cannot find any affirmative evidence against them sufficient to maintain the verdict for the plaintiff. Agreeing with all the other Judges—including the Chief Baron—that the evidence, apart from the "spoliation" of the broken pieces of the machine, was insufficient,

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I cannot add anything to that evidence merely because the fragments were not forthcoming at the trial, having regard to what was proved about them. Three witnesses—the plaintiff, his brother, and Mr. Ireland, whom the plaintiff described in a letter as an "expert"—all saw the broken tube before it reached the possession of the defendants. They had full opportunity of examining the fracture, all were interested to discover in it some evidence of the cause of the injury, and all three gave affirmative evidence that there was "a clean break." They saw nothing in the break to account for what had taken place, save in so far as the inspection suggested Mr. Ireland's opinion that the tube was light or thin. Those broken pieces having reached the custody of the defendants as they did, I think that the Chief Baron was right in holding that when the defendants, in a sense wrongfully, allowed them to be destroyed, the law would raise a presumption that an inspection of them might support the plaintiff's case. But this presumption cannot contradict, or go beyond, the affirmative evidence given for the plaintiff, nor can it amount in itself to evidence that the broken pieces, if produced, would have shown what the three witnesses did not and could not see. I cannot presume, against the evidence of the plaintiff, his brother, and his "expert," that the jury, or other experts, looking at the broken tube, would have seen in it affirmative evidence of defective materials or workmanship sufficient to fix the defendants with liability.

Thus we are, in my opinion, reduced to the question on which the Chief Baron agreed with his colleagues, viz. whether there was, on the plaintiff's case, any sufficient evidence to carry the case to the jury. I cannot think that there was. This cycle was in the hands of the plaintiff, a skilled cyclist, for more than a year; he had used it for nine months; he had taken it to pieces and put it together again; he had stored it; he had had it sent over to him in England. During all that time it had shown no defect. At last, suddenly, and without any apparent reason, the steering-tube broke clean across, and did the mischief. This piece of steel may have broken—as steel often does—nobody could tell why; or it may have broken in consequence of the user it had undergone, being ridden for nine months, having been taken to pieces and put together by a semi-expert; or it may have got a knock, a fall, a

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strain, or a jolt, during the year it had passed in the plaintiff's custody; each of these may just as probably, if not more probably, have been the true account of the injury as any actionable defect of materials or of workmanship. Under such circumstances, I cannot hold that the plaintiff discharged the burden which lay on him of giving evidence to show that an actionable wrong or default of the defendants was more probable than inevitable accident, or than injury arising from a cause for which the defendants were not responsible.

I decide the case upon nothing but the absence of evidence of negligence or breach of contract. I reserve my opinion absolutely upon the questions suggested as to the Sale of Goods Act, and as to the nature of the defendants warranty. I am not prepared to say that, though an article is known by a certain trade name, if it be sold for a known purpose—*e.g.* a cycle for riding—there is not an implied warranty of its fitness for that purpose. I doubt that the clause of the Sale of Goods Act as to the sale of a patent article, or of an article by its trade name, applies to such a case as this. Even in those cases, I think that there is an implied warranty that the article sold is that which it is represented to be. Section 13 provides for a sale by description, and then implies a warranty that the thing so sold answers the description. Where "a Rover Cycle" is sold, I think that there is a warranty that it is a merchantable cycle of that description. No evidence was given here that *every* "Rover Cycle" is thin in the shaft as this one was, or would break as this one did, and whatever evidence the plaintiff gave seems to me to have been just as apposite to prove that this was not a merchantable Rover Cycle as it was to prove that it was not properly made, or was made of defective materials, whatever name it went by. The thickness of the tube is nowhere specified, nor, in my opinion, was this cycle bought as a "specified article" within the meaning of the Act. I do not decide the case on any special or narrow point of warranty, or of pleading, but on the broad common-sense view expressed by the Lord Chancellor in the concluding sentences of his judgment. It is impossible that a man can buy a bicycle of a certain pattern, at a fair price, and of a known make, can keep it for twelve months, ride it constantly for nine, take it to pieces, put it together, store it,

send it about the country, use it as his own, find nothing wrong with it all the time, and then, if it breaks, nobody knows why, while he is running down hill at a fast pace, hold the makers liable upon the ground that its breaking down sufficiently proves that it was from the beginning of defective workmanship or material. I think that, under such circumstances, there is no more presumption that the injury is actionable, than there is when a man who has a watch that has kept good time for a year, finds the main-spring broken, that it was of defective quality or construction from the commencement.

WALKER, L. J. :—

Having read the written judgment of Holmes, L.J., in which I entirely concur, I do not desire to add anything. Our decision is based altogether on the absence of evidence, and has nothing to do with the warranty contained in the Sale of Goods Act, when there is an express warranty in the catalogue.

HOLMES, L.J. :—

The plaintiff when he purchased the cycle which has resulted in this action was aware that the only guarantee, express or implied, which the defendant Company gave with their goods was in the following terms :—"We guarantee subject to the conditions mentioned below that all precautions which are usual and reasonable have been taken by us to secure excellence of materials and workmanship, and we undertake to make good at any time within a year any defects in these respects in our cycles."

Notwithstanding occasional digressions by counsel on both sides, which would only have been relevant if a guarantee in other terms had been under discussion, I take it as admitted that our decision depends upon whether there was evidence to go to the jury that the contract contained in the words quoted has been broken ; and I intend to confine my observations to this issue.

I am of opinion that there is no foundation for the suggestion thrown out but not adopted by Mr. Justice Madden, that the guarantee was only to remain in force for a year after the sale. The contract consists of two parts, the first being a guarantee that reasonable precautions had been taken to secure excellence of

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materials and workmanship, and the second being an undertaking to make good within a year any defects in materials or workmanship, whether such defects have arisen from a want of due precautions or not. The present action is brought for breach of the guarantee to which there is no time limit.

The plaintiff at the date of the purchase had been a cyclist for eight or nine years, constantly engaged in the pursuit, and a skilled and competent rider. He was acquainted with the features of the Royal Rover Cycle, which is the trade name of the article he bought; and the account he gives of his conversation with the representative of the defendant Company shows that he had some knowledge of machines of other types. Although it does not appear in the evidence, it would be the merest pedantry for a Judge to deal with the case on any other basis than that there are many kinds of bicycles each bearing distinctive names, sold at different prices, and varying in design, pattern, strength, and durability. The plaintiff having bought the bicycle in March, 1897, had it in constant use until the following October, taking it out four times a week and riding long distances. In October the plaintiff went to reside in Leeds; and before leaving Belfast he took the machine asunder, all but the forks and the saddle, detaching the wheels and underguards, separating the front fork from the front wheel, and leaving the frame, forks, and steering post as they were. In the following February, the several portions of the dismantled bicycle were sent to Leeds where it was put together by the plaintiff; and from that time until the 5th April, he rode to his business on it every day, weather permitting, and when not at work he took excursions on it. During all this period and with so many opportunities of testing it, he never observed any defect in either materials or workmanship; and the repairs required were of a trivial character. At length at 11 o'clock p.m. on the 5th April, 1898, as he was riding on a good road down a gentle decline at the rate of between ten and twelve miles an hour, the machine broke down suddenly and unexpectedly, with the result that the plaintiff received serious personal injuries, for which the damages awarded by the jury would not be excessive compensation. An inspection of the broken bicycle left no doubt as to the immediate cause of the accident.

The steering post or tube had snapped across; it was a perfectly clean break without a trace of flaw of any kind, and not at the welding or brazing. The physical features of the broken tube are inconsistent with a defect of workmanship, at least as such a defect is generally understood. If the welding or brazing had given way it might afford some evidence that the workmanship was defective, although there would be still the question whether the defect was consistent with exercise of reasonable care. That a metal tube in constant use for many months and subject during that period to a severe strain should suddenly snap across with a perfectly clean break, and show no trace of flaw, is in itself no evidence of defective material.

It may be asked what was the cause of the fracture—how can the accident be explained? I reply that, unless some further light can be given than is afforded by the facts already mentioned, this is a question that neither I nor the jury nor any other judicial tribunal can answer. There may have been something wrong in the original making of the tube that caused it to break; but it is at least equally if not more consistent with the facts that during the eight or nine months when the bicycle was in constant use, or in the course of taking the machine asunder and refitting it, or in its transit from Belfast to Leeds, or by a fall when it was idle, that the tube received a jar to which the fracture might be traced. Or it is possible that the break was not due to any of these causes. A time comes sooner or later when metal subject to a strain gives way. Who can tell why the mainspring of his watch, which has done its duty for months or years, gives way at an unexpected moment, or why the brass chain that supports a picture suddenly breaks without a trace of rust or flaw?

For these reasons I am of opinion, agreeing I believe in this with all the Judges of the King's Bench Division, that the happening of the accident, the fracture of the tube, and the appearance presented by it afterwards, afford no evidence of breach of the guarantee given by the defendant Company.

The broken bicycle was inspected by the plaintiff's brother, a bicycle rider for sixteen years, and by Mr. Leslie Montgomery, also a cyclist; but these witnesses added nothing to the plaintiff's testimony.

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The positive evidence relied on by his counsel was that of Mr. Ireland, who has been in the cycle trade since 1891, and is presumably an expert. He examined the broken machine when it was sent back to Belfast. He said the break was a clean one, and not at the brazing; and he expressed an opinion that "the tube was rather light, and that it should have had a lined or a graduated tube—that is, a tube thickened with heavier metal towards the crown." This seems to me to give no help upon the only question in the case—whether the guarantee which related only to materials and workmanship was broken. He says that the machine would have been stronger if the tube had been differently designed. No doubt many improvements might have been suggested; but the point is that, taking it as a tube of a certain pattern—a pattern which no one ventures to say was unfit to be used as the steering-post of a bicycle, was there anything to show defective workmanship or materials? From the beginning to the end of the case, there is no such evidence; and therefore, unless the circumstances were such as to throw on the defendant Company the burden of proving affirmatively that usual and reasonable precautions had been taken to secure excellence of materials and workmanship, they were entitled to a direction without the production of additional witnesses.

Thus far I think there is complete agreement between my views and those of the Divisional Court; and I have now come to the point on which the Lord Chief Baron differed from his colleagues. A few introductory words are necessary to explain this branch of the case. When the plaintiff met with the accident, his brother Robert went to Leeds to see him; and, having remained there for about ten days, he returned to Belfast, bringing with him the broken cycle. It does not appear that up to that time any application had been made on the plaintiff's behalf to the defendant Company or to Mr. Gass, their agent in Belfast. It appears, however, that on the 20th April, the plaintiff's father visited the latter's place of business, and inquired what the Company were going to do in the matter of the accident, the nature of which was then, if not before, communicated to Mr. Gass. On the following day, Robert Williamson wrote to Gass, saying that

his brother was not yet well enough to take the matter in hand himself, and that he did not know whether it would be enough to replace the bicycle with a new one. On the same day Gass asked Robert Williamson to let him have the machine for inspection, and after some hesitation this was assented to. Gass thereupon wrote to the defendants, saying that he had received the cycle, and inquiring whether he should send it to the works. He was requested to do so, and it was forwarded on the 26th inst. "for inspection" as Gass said in his accompanying letter. The plaintiff, having returned to Belfast on the 28th April, had one or two interviews with Gass between that date and the 10th May, on which day the bicycle was sent back mended, with a new lined steering-post and forks. He says that he complained to Gass of these repairs, and told him he wanted the machine as it was when broken; but he does not appear to have followed this up, nor does he refer to it in his subsequent correspondence with the defendant Company. Several letters passed between them in the course of May and June, in one of which the plaintiff stated that he had expert evidence of a vital defect in the cycle; and, at length, on the 22nd July, when a settlement was found to be impossible, the writ was issued. The only reference in writing to the broken portions of the machine is to be found in a letter from the plaintiff's solicitor to the solicitors of the Company dated the 12th August, in which the latter's clients were cautioned against tampering with, interfering with, or altering in any way, the broken frame. This was replied to on the 18th August by a letter stating that the broken parts were, in the ordinary, way put on the scrap-heap, which was cleared out weekly, and that consequently they were not forthcoming.

I have been somewhat minute in setting forth the foregoing facts, because the application of the legal principle on which the Lord Chief Baron rests his judgment must depend upon the circumstances of each case; and it is therefore impossible to deal with it satisfactorily by abstract considerations.

There is no doubt that the plaintiff has been prevented by the action of the defendants from producing at the trial the broken parts of the machine; and that in certain circumstances the plaintiff would have been entitled to rely strongly on this fact is

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undoubted. For example, if the plaintiff had given some evidence of a defect in materials or workmanship which was encountered by other evidence, the non-production of the broken pieces would probably have been fatal to the defendants' case. But I know of neither authority nor principle for the proposition that in a case like the present the destruction or withholding by one party of something which, if produced, might or might not afford evidence on a particular issue, will in itself supply evidence which would otherwise be entirely wanting. It may, however, in certain cases alter the burden of proof. The Scotch case, before Lord Young, is a good illustration of this. A man was injured by the breaking of a chain, and the foreman of the works to which the chain belonged threw it into the Clyde before it could be examined. No evidence, therefore, could be given of the cause of the fracture. It might have been the result of want of care on the part of the owners or it might not, and it was held, I think properly, that in the circumstances it was for the defendants, whose representatives had destroyed the very evidence by which the plaintiff might possibly have sustained his case, to prove that the break did not arise from want of due precautions. The marked distinction between that case and the present is that here the plaintiff has not been deprived of any evidence by what has been done by the defendant Company. The broken bicycle was under the plaintiff's control for a fortnight after the accident and was inspected by persons of skill and judgment, four of whom have been examined. If their evidence is accurate and trustworthy, as I have no doubt it is, the jury had before them all possible information as to the cause of the break down. The production of the pieces would not have supplemented it unless the jurors would have been able to see more than the plaintiff's witnesses. The letter of the 12th August—the only representation made on behalf of the plaintiff in reference to the pieces—does not demand their return, but merely gives a caution against interfering with or altering them. It was a skilful piece of tactics in the conduct of the case which was supposed to be complete without them; and undoubtedly if the appearance of the broken bicycle as deposed to on behalf of the plaintiff had afforded evidence of defects in materials or workmanship, the non-production of the fragments

would have helped him in the event of his evidence being controverted or criticised by the defendant Company. But I cannot assume that the broken pieces if produced would have contradicted the testimony relied on by the plaintiff. If the contents of a letter material to an issue at trial and destroyed by one of the parties to the litigation were proved either by a copy made at the time or by the recollection of the writer, could the other party contend that a jury was at liberty to assume without any further evidence that the purport of the letter was something wholly different from what was deposed to? Upon the ground that in this case the non-production of the broken parts of the machine deprived the plaintiff of no material testimony, I hold, with the majority of the Divisional Court, that such non-production did not relieve the plaintiff from the obligation imposed on him in this class of action; and that having failed to give any evidence from which a breach of warranty could be inferred, the defendant Company are entitled to judgment.

I may add that I see no reason to believe that the defendant Company did not act with good faith in repairing the bicycle. Its officers were no doubt concerned that a serious accident should have occurred in connection with one of their machines; and they were anxious to do something for the plaintiff. They took credit for mending the bicycle in such a way as to make it a stronger article than what it was when originally bought; and they were willing to give it so repaired, or a new machine in substitution for it, to the plaintiff; nor do I think that it occurred to them or their workmen that it was important to preserve the broken pieces. At the same time I agree with the Lord Chief Baron, that in the circumstances this is immaterial; and the conclusion at which I have arrived is irrespective of the motives influencing the defendants.

Solicitors for the plaintiff: *M'Lean & Son.*
Solicitors for the defendants: *Carson & M'Dowell.*

R. D. M.

Q. B. Div. 1901.

Jan. 14.

Appeal.

Feb. 11.

NOLAN *v.* CULLEN (1).

Practice—Civil bill—Ejectment for overholding—Transfer of matter to Superior Court—37 & 38 Vict. c. 66.

A civil bill ejectment for overholding may be ordered to be brought up and tried in the Queen's Bench Division under 37 & 38 Vict c. 66.

The words "action of ejectment upon the title" in 40 & 41 c. 56, s. 54, include actions of ejectment for overholding.

ADJOURNED SUMMONS, under the 37 & 38 Vict. c. 66, sect. 2, which the defendant issued by leave of Johnson, J., in the vacation, calling upon the plaintiff to show cause why the civil bill ejectment for overholding in this matter should not be tried in the Queen's Bench Division. The grounds upon which the transfer was sought were — 1, that the title to lands or hereditaments of a greater annual value than £30 would be affected by the decision in the action; 2, that the premises sought to be recovered with the buildings erected thereon were of a saleable value of at least £800, and 3, that the questions and issues involved in the action were of such difficulty and importance as regards both law and fact as to render the action wholly unfit to be tried in the County Court. The summons further suggested that the Judge, if he thought expedient, might upon such terms as he should consider proper to impose, order that the civil bill proceedings should be discontinued and that the action should be tried in the Queen's Bench Division. The defendant, Frederick F. Cullen, was the proprietor of a training establishment known as Rossmore Lodge, Currragh, county Kildare, and was the owner of race horses. On the 31st December, 1900, he was served with a civil bill ejectment for overholding at the suit of the plaintiff, Bridget Nolan, seeking to recover from him possession of part of the lands of Friarstown, containing 1A. 0R. 38P. with buildings

(1) In the Queen's Bench Division before PALLES, C.B., and MURPHY, BOYD, and BARTON, JJ.

and edifices thereon, alleged to be held by him as tenant from year to year to the plaintiff at the yearly rent of £4 18*s.* 11*d.*, and which tenancy was alleged to have been determined on the 1st November, 1900, by notice to quit served for that purpose. Besides the lands which were the subject-matter of the present proceedings the defendant held about 30 statute acres of the lands of Friarstown and other portions of the Curragh adjoining partly in fee and partly under a lease. Rossmore Lodge, with extensive out-offices and training stables, was erected on the plot in dispute. The defendant's estimated value of the training establishment was £2000, and he alleged that the separation of the buildings from the lands would practically render the premises useless as a training establishment and would destroy a very valuable property. The entire Poor Law valuation of the defendant's holding was £34 5*s.*, and that of the portion in dispute £12; but the defendant stated that the latter sum did not nearly represent the letting value of the premises. The defendant admitted that he had been paying a rent of £4 18*s.* 11*d.* to the plaintiff, but said that this rent was paid by him in complete ignorance of the identity of the premises out of which it issued or the title under which it arose. He had ascertained in the month of May previous, for the first time, that not only had the plaintiff no claim to the rent, but that her interest in the premises had long since ceased. The defendant alleged that the title was complicated and difficult, the deeds commencing in the early part of the nineteenth century, and numbering over fourteen altogether, with several maps. Various portions of the property now in the defendant's possession had been acquired from time to time by different owners, boundaries were obliterated, and it would be necessary to employ and examine skilled engineers and several other witnesses to prove various measurements, estate and other maps, &c.

O'Brien, Q.C. (with him, *W. G. Gibson*), for the defendant in support of the application.

James O'Connor, for the plaintiff:—

Section 2 of 37 & 38 Vict. c. 66 does not apply to cases of ejectment for overholding.

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W. G. Gibson, in reply.

PALLES, C. B. :—

We have considered this case, and our opinion is that the words in the Act of 1877, section 54, "action of ejectment upon the title," include an action of ejectment brought for overholding, and, as we have the jurisdiction, the case is eminently one in which it ought to be exercised.

At common law, and according to the procedure of the Superior Courts, an ejectment brought for overholding was an ejectment on the title. Upon the expiration of a tenancy, after the service of a notice to quit, the tenant became a trespasser, and therefore the proper proceeding to put him out of possession was an ejectment upon the title. That being so, the Act of 1851 (14 & 15 Vict. c. 57) seems to me to have divided cases of ejectment on the title into several classes, in one of which there had been the relation of landlord and tenant, which had been determined by notice to quit. In such cases the County Court was given jurisdiction provided the rent did not exceed a specified sum. A second class was of cases within the 79th section in which the relation of landlord and tenant had not existed. But in neither of the sets of provisions in reference to these classes, nor in any other provision in reference to ejectment, does the statute contain the words "ejectment upon the title." Therefore we cannot say that that expression was used in the Act of 1851 in a more limited sense than it was known to the common law. No doubt in the marginal note to section 79 the expression "ejectment upon the title" is used, but there is no doubt that the marginal note is not part of the Act of Parliament.

By Sir Colman O'Loghlen's Act, 37 & 38 Vict. c. 66, s. 1, additional jurisdiction is given to try by civil bill actions in which the title to corporeal or incorporeal hereditaments shall come in question, when the value of the lands shall not exceed £20 a year under the Valuation Acts. And by the Act of 1877, section 54, the words there are to be read as including, for the purpose of the section, any action of ejectment upon the title. I am not able to cut down those words to cases of ejectment on the title

otherwise than for overholding. I am of opinion that, where there is an overholding, the landlord has an option of proceeding in the Civil Bill Court in either of the two forms, either by ejectment for overholding under Deasy's Act, in which he must prove the relation of landlord and tenant, or by an ordinary ejectment on the title.

I am therefore of opinion that there is jurisdiction. The only answer that has been given to our exercising it is that after a formal decision before the County Court Judge, determining that there was a tenancy in respect of some land which was either ascertained or not ascertained, the matter should be raised by cross-ejectment. I think it is a great deal better that the real question should be determined in the first instance.

MURPHY, BOYD, and BARTON, JJ., concurred.

The form of the order was :—

"IT is ordered that the proceedings in the civil bill ejectment in the title hereof be discontinued, and that the same be removed into this Court for trial, and accordingly that the said plaintiff be at liberty to amend the said civil bill ejectment as she may be advised, and that the same, when so amended, do stand as a statement of claim, and be filed in the proper office of this Division, and that the said defendant do have 14 days after service, or after notice of the filing thereof if not amended, to deliver a statement of defence, and that all subsequent proceedings be carried on in this Division as if the action had been an ordinary action commenced in this Court; and the defendant's counsel so requesting, it is further ordered that the said defendant be at liberty, within three weeks from this date, to lodge in Court the sum of £100 to the credit of this action, and to abide further order; and that the costs of the motion on both sides be costs in the action."

J. L.

The plaintiff appealed.

Appeal, Feb. 11.

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Molony, K.C., and *James O'Connor*, for the appellant.

O'Brien, K.C., and *W. G. Gibson*, for the respondent.

The Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L. JJ.) affirmed the decision of the Divisional Court.

Solicitor for the plaintiff: *W. H. Byrne.*
Solicitors for the defendant: *J. L. Scallan & Co.*

R. D. M.

In the MATTER of an ARBITRATION between ELLEN O'DONOVAN and CAMERON, SWAN & CO. (1).

Appeal.
1900.
Nov. 6.

Master and servant—Workmen's Compensation Act, 1897—*Death of workman as result of accident—Death of sole dependent before claim for compensation*—Actio personalis moritur cum persona.

The sole total dependent of a workman, who was killed by an accident arising out of his employment, died before she had filed or served a claim for compensation under the Workmen's Compensation Act, 1897. Had she lived, and taken the necessary steps to recover it, she would have been entitled to £150 compensation. The personal representative of the deceased workman subsequently took proceedings in the County Court to recover compensation, to be applied for the benefit of the dependent, and in payment of her debts:—

Held, that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount.

Appeal (on a case stated) from a decision of the County Court Judge of the West Riding of Cork in an arbitration under the Workmen's Compensation Act, 1897.

The facts are stated as follows by the learned County Court Judge:—

1. Patrick Calnan was, on November 23, 1899, killed by an accident arising out of, and in the course of, his employment, to which this Act applied. The respondents were his employers.

2. The said Patrick Calnan left him surviving his mother, Mary Calnan, who was totally dependent upon him within the meaning of the Act.

3. The said Mary Calnan, on November 30, 1899, served notice of the accident and injury. No claim for compensation was filed in the office of the Clerk of the Crown and Peace, or served on the respondents during the lifetime of Mary Calnan.

(1) Before Lord Ashbourne, C., and FitzGibbon, Walker, and Holmes, L. JJ.

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4. On March 1, 1900, the said Mary Calnan died, having by her will, dated February, 12, 1900, bequeathed the compensation therein alleged to be due to her under the Act to the persons therein named, and of her said will the said Mary Calnan appointed the Rev. John O'Hea, P.P., of Ardfield, her executor, and directed that the said compensation should be received by him and divided between the legatees therein named, the creditors of the said Patrick Calnan, deceased, and of the said testatrix to be first paid thereout.

5. On April 18, 1900, probate of the said will was granted forth of the Cork District Registry, Queen's Bench Division (Probate) of the High Court of Justice in Ireland, to the said Rev. John O'Hea, the executor therein named, and on March 21, 1900, letters of administration of the personal estate and effects of the said Patrick Calnan, deceased, were granted forth of the said Court to the applicant who is a sister of the said Patrick Calnan, deceased, and a daughter of the said Mary Calnan, deceased.

6. Three years wages of the deceased would be less than £150, and had Mary Calnan lived she would have been entitled to £150 under the Act.

7. The respondents admitted that if Mary Calnan lived until her claim for arbitration had been decided, she would have been entitled to compensation, but they contended that as she died before any claim was made by her, neither her representatives nor the administratrix of Patrick Calnan had any right to compensation under the Act.

8. Upon this point I dismissed the application.

The request for arbitration was brought by the administratrix of Patrick Calnan, and stated that the deceased (Patrick Calnan) left his mother (Mary Calnan) wholly dependent upon him, and that "application is made for compensation to be applied for her benefit, and in payment of her debts."

A. M. Sullivan, for the appellant:—

Mary Calnan's right to receive compensation arose on Patrick Calnan's death leaving her a dependent. This right is a statutory condition of his contract of service—a sort of statutory insurance.

Finlay v. *Tiernan* (1), *Bathyany* v. *Walford* (2), and *Concha* v. *Murietta* (3), show that this right of Mary Calnan survived to her representatives.

Bourke, Q.C., and *Sheehan*, for the respondents :—

No cause of action vested in Mary Calnan up to the time of her death. She had not complied with the condition precedent required by section 2 (1) of the statute; she had not made a claim for compensation. The claim here is for compensation to be applied in payment of the sole dependent's creditors : such a claim is outside the scope of the Act. Article 4 of the schedule provides that payment if made to the personal representative is to be for the benefit of the dependents, or other persons entitled thereto under the Act, *i.e.* persons who have given medical attendance or provided the burial. The right to compensation was assets neither of Patrick Calnan, nor of Mary Calnan. There was no claim for compensation here before these proceedings were instituted : such a claim is a condition precedent to serving the civil bill : *Powell* v. *Main Colliery Co.* (4).

LORD ASHBOURNE, C. :—

This case comes before us on an appeal brought under the Workmen's Compensation Act, 1897, from the decision of the County Court Judge of the West Riding of the county Cork, who has furnished us with a statement of the circumstances upon which the rights of the parties arise.

It appears that Patrick Calnan was on November 23, 1899, killed by an accident arising out of, and in the course of, his employment to which the Workmen's Compensation Act applied. The respondents were his employers. The deceased man left him surviving his mother, who was totally dependent upon him within the meaning of the Act. The mother on November 30, 1899, served notice of the accident and injury, but no claim for compensation was during her lifetime served on the respondents, nor filed in the office of the Clerk of the Peace. The mother died on

(1) 20 Q. B. D. at p. 502.
(2) 36 Ch. D. 279.
(3) 40 Ch. D. 543, at p. 553.
(4) [1900] 2 Q. B. 145 ; [1900] App. Cas. 366.

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March 1, 1900, and on March 21, 1900, letters of administration to the estate and effects of the deceased workman were granted to the plaintiff. The plaintiff then preferred her request for arbitration, which was duly filed, and by the County Court Rules (rule 22) is to be deemed an equity civil bill. This document gives the particulars required by the rules, and is in the prescribed form. In that part of the document where the applicant is required to give "particulars as to the dependents of the deceased workman by whom or on whose behalf the application is made," the applicant states that "the deceased left his mother, Mary Calnan, wholly dependent on him, and application is made for compensation to be applied for her benefit," and in fresher ink, and apparently after consideration, is added "*and in payment of her debts.*" The application was, therefore, made on behalf of the mother as the sole dependent of the deceased; it proposes that the compensation should be applied for her benefit, and in payment of her debts: it does not purport to be on behalf of any other person, or for any other purpose, and it does not seek on behalf of the deceased's personal representative any recoupment of medical or funeral expenses.

When the application was heard before the County Court Judge the respondents admitted that, if the mother had lived until her claim for arbitration had been decided, she would have been entitled to compensation, but they contended that as she died before any claim was made by her, neither her personal representative nor the administratrix of the deceased workman had any right to compensation under the Act. The County Court Judge yielded to this contention, and dismissed the application.

What was the position of the parties at the date of the service of the civil bill? The sole dependent of the deceased for whom the compensation is claimed was then dead: she no doubt had served a notice of accident, but she had not followed it up by instituting proceedings, or claiming compensation. The proceedings which were subsequently instituted by the deceased's administratrix could only be brought on behalf of a dependent of the deceased, and the sole dependent was dead before the request for arbitration was filed. On the construction of the statute it is clear there must be a living dependent by or on whose behalf the pro-

ceedings are to be taken. I am, therefore, of opinion that the appellant has failed to make out that she is entitled to recover compensation under the Act, and that the decision of the County Court Judge should be affirmed. But I say nothing as to what the rights of the parties would have been had the deceased's mother died after the institution of the proceedings.

FITZ GIBBON, L.J. :—

I concur. In dealing with the maxim *actio personalis moritur cum persona*, it is necessary to bear in mind the ambiguity arising from the double signification of the term "*actio*." It may mean either (i) a pending proceeding to enforce a cause of action; or (ii) a right of action vested though not yet sued upon. In the present case there was no *actio* in the sense of a proceeding pending at the death of the woman on whose behalf the claim is now made. I say nothing as to a difficult question which may arise as to the effect of the death of a person who has commenced a proceeding under the Act, but who dies before an award has been made. If an injured workman—for example—served notice of an injury, and a claim for arbitration, and commenced proceedings under the Act, and if, during the course of these proceedings—which might last a considerable time—the workman happened to die, I should find great difficulty in saying that his death would carry with it the loss of the subsistence-money, to which, had he lived till a decree was pronounced, he would have been entitled. But the difficulties in the way of holding that a right of action actually sued upon must die with the person who sues, do not arise in the present case, for here no proceeding was taken by anyone named as a possible claimant in the Act.

The House of Lords has decided that something less than the actual institution of proceedings will amount to making a claim for compensation under the Act. But here the "dependent" neither made any claim, nor instituted any proceeding, and she was dead when her personal representative began the present proceedings. There was a period of time after the injury during which there existed no dependent; no personal representative of the deceased; and no proceeding or claim. When the personal

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representative was raised, there was no dependent in existence on whose behalf compensation could be claimed. We have not to deal with a claim for medical or funeral expenses; possibly none such were incurred by the personal representative, and the right to recover them is given by the Act only as an alternative where there is no claim on behalf of dependents.

Thus Mr. Sullivan, to sustain his argument, is driven to the proposition—which he did not shirk—that at the death of the workman the dependent became the proprietor, thereby and thereon, of a vested cause of action—so completely vested as to pass on his or her death to his or her personal representative. The right of action is not assets of the workman, for though the Act prescribes that his representative may take the proceedings, he can do so only as a trustee for dependents, or to recover expenses actually incurred. It is equally clear that similarly no such vested proprietary right of action vests in the workman's dependents at his death. At best, a right of action arises for their benefit, which they may or may not exercise. If they do exercise it, and make their "claim," it may be difficult to hold that the claim will not merely *abate*, but will *perish* by the death of the claimant, before the compensation has been awarded. But if they do not exercise it, if they make no claim, if they institute no proceeding, the action cannot be initiated, nor can the claim be for the first time made, by the personal representative of the deceased workman, suing on behalf of dependents who were dead before the representation was raised. The definitions in section 7 of the Act support this view. In the definition of "workman" it is said "any reference to a workman who has been injured, shall, where the workman is dead, include a reference to his legal personal representatives." But, on the contrary, in the definition of "dependents," their representatives are not included, and the term is limited to "such members of the workman's family, specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death." None such existed when this claim was first made on their behalf, and therefore it cannot be sustained.

WALKER, L. J. :—

The notice of accident was served by the mother of Patrick Calnan, not by the personal representative of the deceased claiming on her behalf as a dependent. But she took no further step, and did not institute proceedings under the Act. On March 22 there was no dependent, and no *actio* to live or die. On this ground alone I base my decision. I say nothing as to whether, if the mother had commenced proceedings, or if the personal representative had commenced proceedings on her behalf in her lifetime, such proceedings would have died with her.

HOLMES, L. J. :—

The respondents ask this appeal to be dismissed on two grounds—1, because there was no claim for compensation within the meaning of the 2nd section of the Act of 1897; and, 2, because, even if it were held that there was such a claim, the fact that there was no dependent on the deceased workman in existence when the claim was made renders it invalid or ineffectual. The first ground, I think, cannot be sustained. It rests upon what I think is a misunderstanding of the decision of the House of Lords in *Powell's Case* (1). It was there decided that there might be a valid claim for compensation other than and previous to the request for arbitration; but it was not decided that the request for arbitration is not in itself a good claim for compensation, or that there must be a separate antecedent claim. There are, no doubt, some passages in the judgment of Romer, L.J., that lend themselves to this view; but I doubt that he so intended them, and I do not find anything in the speeches in the House of Lords to indicate that the House accepted such a proposition.

The second point is, I think, a good one. I am of opinion that the claim must be made by, or on behalf of, a living dependent. If there be a sole dependent alive at the date of the death of the workman, and such dependent dies before the claim is made, it cannot afterwards be made for his benefit, either by his own personal representative or by the personal representative of the workman. I say nothing about a claim for the medical expenses

(1) [1900] 2 Q. B. 145; [1900] App. Cas. 366.

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and burial of the workman, as in this case no claim was made therefor; and I leave open the effect of the death of the dependent after claim and before award. Whether such an event would put an end to the claim altogether, or whether it could be revived for the benefit of the deceased, must be decided when the case arises.

Solicitor for the appellant: *O'Driscoll.*
Solicitor for the respondents: *Moriarty.*

G. Y. D.

Q. B. Div. 1900.

Feb. 24.

KENEALY *v.* KEANE (1).

(1900. No. 1471.)

Municipal Corporations (Ireland) Act, 1840 (3 & 4 *Vict. c.* 108), *s.* 89—*Local Government (Ireland) Act*, 1898—*Action for penalties for acting as a councillor while disqualified—Security for costs.*

In an action, brought under the Local Government (Ireland) Act, 1898, and the Municipal Corporations (Ireland) Act, 1840, sect. 89 (thereunder adapted), to recover penalties for acting as a councillor while disqualified, it is within the discretion of the Court to decline to order security for the defendant's costs where the only ground suggested is the plaintiff's poverty.

Summons, on behalf of the defendant, that further proceedings in the action should be stayed unless security for costs were given. The action was brought to recover £200, being for four penalties of £50, against the defendant, for having acted as a member of the Kilkenny Corporation while disqualified from so acting. The plaintiff alleged that the defendant by himself or his partner was concerned in a bargain or contract with the Corporation.

The present summons was issued on the 17th for the 21st February, 1900. The defendant, in the affidavit on which the application was grounded, stated that his solicitor on his instructions had on the 3rd February, 1900, accepted service of the writ of summons in this action, and that an appearance had been therein entered for him on the 13th February, 1900:—that he was joint proprietor of the *Kilkenny People* newspaper, with Mr. P. J.

(1) Before Kenny, J.

O'Keeffe, who had been served with a similar writ of summons at the suit of same plaintiff; that the plaintiff was the editor of the *Kilkenny Journal* newspaper, and that, except his salary as such editor, he had not, in the defendant's belief, any property whatever; that the plaintiff had also been town-clerk of Kilkenny, but had been recently dismissed from that position. The defendant further deposed that he had a good defence to the action, and stated that, since the *Kilkenny People* newspaper was established, about eight years ago, the plaintiff and his newspaper had been bitterly hostile to it, and that the present action had been brought "through a spirit of rivalry and personal malice, and for the purpose of ruining" the defendant and his newspaper. The dedefendant submitted that if the plaintiff failed in this action the defendant could never recover the costs of it against the plaintiff, and that "for the reasons above given," the plaintiff should be ordered to give security for the costs. An adjournment had been applied for and granted, to allow of an affidavit being filed by plaintiff, but no affidavit was filed.

[There was a similar application on behalf of Mr. O'Keeffe.]

J. J. Clancy, for the defendant, cited section 89 of the Municipal Corporations Act, 1840, 3 & 4 Vict. c. 108, and relying on *Powell* v. *Reynolds* (1), argued that the section was mandatory. He did not press the allegation of "personal malice," &c.

W. G. Gibson, for the plaintiff, submitted that the section was discretionary, and that, as the question of malice was abandoned and the plaintiff's poverty the only ground on which the application was supported, the application should be refused. In no case had the plaintiff's poverty merely been held a sufficient ground to order security for costs. *Powell* v. *Reynolds* (1) did not so decide, and the later cases supported the view submitted: *M'Lester* v. *Quin* (2); *Hamill* v. *Henry* (3); and *Browne* v. *Redmond* (4). [Counsel also referred to *Worrall* v. *White* (5); *Cowell* v. *Taylor* (6); *Cook* v. *Whellock* (7); *Rhodes* v. *Dawson* (8).]

(1) 3 Ir. Jur. (O. S.) 59.
(2) 10 Ir. C. L. R. 358.
(3) 6 Ir. Jur. (N. S.) 340.
(4) 11 Ir. C. L. R. App. 26.
(5) 9 Ir. Eq. R. 572.
(6) 31 Ch. D. 34.
(7) 24 Q. B. D. 658.
(8) 16 Q. B. D. 548.

Q. B. Div. 1900.

KENEALY v. KEANE.

KENNY, J.:—

This application, which comes before me sitting in Chamber, is for an order under section 89 of the Municipal Corporations (Ireland) Act of 1840, that the plaintiff be required to give security for the costs of the action, or, in default, that all further proceedings be stayed.

The matter of this application has been already before Mr. Justice Boyd, and he held—and the propriety of his decision is not questioned—that, so far as the mere question of time was concerned, the defendant had made his application within the period limited by the Act, and no point is now raised as to that portion of the section which provides that the defendant must obtain the order "within 14 days after he shall have been served with process in any such action."

The action is one in which the plaintiff claims £200 for penalties against the defendant, for exercising, while disqualified, the functions of a member of the Kilkenny Corporation. The matters in dispute have already been before this Court on an application for penalties in the case of *Kenealy* v. *O'Keeffe* (1), on a case stated by the Justices at Kilkenny Petty Sessions, and, as the result of the decision of the Court in that case, fines have been since imposed by the Justices.

In the defendant's affidavit on which the present application is based, he says that the plaintiff is the editor of the *Kilkenny Journal*, and had for some years past been town clerk of Kilkenny, but that he no longer fills that position, and that the present action is brought through a spirit of rivalry and personal malice, and for the purpose of ruining the defendant and the *Kilkenny People* newspaper. The affidavit also alleges that the plaintiff is a person of no means, and that he is unable to pay the costs of this action in case a verdict should be found for the defendant.

A reply was to have been put in to this affidavit, but it was stated at the bar that the plaintiff was not available for the purpose. I therefore must take it that the statements in this affidavit are not denied, and I shall assume accordingly that the plaintiff is a person who has not the means to pay the defendant's costs in the event of the plaintiff's failing in the action.

(1) *Ante*, p. 39.

Under these circumstances is the defendant entitled to get security for his costs?

The 89th section of the Municipal Corporations (Ireland) Act, 1840 (3 & 4 Vict. c. 108) provides that if a person acts as mayor, alderman, or councillor of a borough, when disqualified, he shall forfeit for every such offence the sum of £50, and that such sum shall be recovered with full costs of suit by any person (being a burgess) who shall sue for the same within three calendar months after the committing of such offence . . . "Provided always that it shall be lawful for any defendant by Judge's order or by the order of the Court, to be obtained within fourteen days after he shall have been served with process in any such action, to require the plaintiff to give security for costs; and in such case, all further proceedings in the said cause shall be stayed until the plaintiff shall give security . . . for the costs of such action, in case a verdict shall pass for the defendant."

The question of the construction of that section came before the Court in the year after the passing of the Act in the case of *Powell* v. *Reynolds* (1). It was a suit for penalties, and the Court, while expressing no opinion as to whether the section was mandatory or not, considered that they had, independently of the Act, a discretion whether to make the order or not; and, in the exercise of that discretion, they made absolute the conditional order for security for costs.

Since that decision three cases have been decided: *M'Lester* v. *Quin* (2); *Hamill* v. *Henry* (3), and *Browne* v. *Redmond* (4). The first and second of these cases were brought under section 24 of the Corrupt Practices Prevention Act (17 & 18 Vict. c. 102), and the third was brought under section 89 of the Act of 1840. There can be no doubt that by the former of these Acts a discretion as to enforcing security for costs is given. The words of the 24th section are, "if they, or he, (the Court or Judge), shall think fit." This language is not to be found in the 89th section of the Act of 1840, but, notwithstanding, I am of opinion that the section is not mandatory. It gives in express terms a power, already possessed

(1) 3 Ir. Jur. (O. S.) 59.
(2) 10 Ir. C. L. R. 358.
(3) 6 Ir. Jur. (N. S.) 340; 12 Ir. C. L. R. 467.
(4) 11 Ir. C. L. R. App. 26.

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by the Court, of ordering security, but with a proviso that the order must be obtained within a limited time from the service of process. The object of the insertion of an already existing power may have been to remove doubts—if any existed—that the power to order security applied in *qui tam* actions, or to recognise the existence of the power, but with a limit of time for its application. Monahan, C.J., in *M'Lester* v. *Quin* (1) endeavoured to explain the introduction of the power in the 24th section of the Corrupt Practices Act, but he could only do so by mere conjecture. Whatever the object may have been, it seems to me that the words of the 89th section, "it shall be lawful for any defendant by Judge's order . . . to require the plaintiff to give security for costs," leaves untouched the judicial discretion which the Judge or Court then had of granting or refusing the order. If the discretion were intended to be taken away, I think that much less ambiguous language would require to be used. But in *Browne* v. *Redmond* (2) the application for security was made under the very section relied on in the present case. In that case the Court came to the conclusion that the pauper was a mere stalking-horse put forward in the interest of other parties, and on that ground made the order. But the point as to the section being mandatory was never raised, and the Court made it clear that poverty alone would be insufficient to successfully maintain the application. It is impossible to conceive that a Court, constituted as that was, would have thought it necessary to elaborately discuss the question of a sham plaintiff, if the section was a mandatory one applicable to every case of a pauper plaintiff.

It is every-day practice in this Court under the Judicature Act, where collusion is shown or where a sham plaintiff, or a person acting as trustee or assignee for the real plaintiff, who is outside the jurisdiction, is put forward, to make an order staying proceedings until security for costs be given. But it is opposed to the practice of the Courts, and to the course of legislation, to order that any person against whom the only allegation is that he is a pauper, should be obliged to give security for costs; and, in no case that I know of, under the Judicature Act, where the only allegation is

(1) 10 Ir. C. L. R. 358. (2) 11 Ir. C. L. R. App. 26.

that a plaintiff living within the jurisdiction has no means, has such an order been made. There must be something more to lead the Court to the conclusion that security should be given. If the plaintiff be an undischarged bankrupt—if he be a mere stalking-horse for another—the Court might order security; but I take the case of *Browne* v. *Redmond* (1) as a declaration of the law governing the procedure of the Court in a case of this sort, that poverty alone is not sufficient to justify the order being made, and as an authority for holding that the section in question is not mandatory.

Under these circumstances the application must be refused with costs.

Solicitor for defendant: *James Harte.*
Solicitor for plaintiff: *Nicholas Shortall.*

A. E. R. J.

CRAIG *v.* BOYD (2).

(1898. No. 75.)

Practice—Taxation of costs—Probate—Costs "in the action"—Counterclaim—Caveat—Citations—Subpœna, insertion of names in, after sealing of—Witnesses, expenses of—Attendance of country solicitor in Dublin.

An action having been brought by an executor propounding a will of 1897, the defendant put in a defence, which was substantially a counterclaim, propounding a will of 1894. The plaintiff pleaded, by way of reply, the revocation of the will of 1894 by the will of 1897 and two intermediate wills. At the trial the will of 1897 was established, and an order made giving plaintiff and defendant their costs properly incurred in the action out of the assets.

On a motion to review the taxation of the defendant's costs, it was objected that the taxing-master should not have allowed the defendant the costs of the counterclaim, on the ground that they were not costs "in the action." No such objection was taken before the taxing-master:—

Held (1), that this objection could not now be relied on; and (2) that, even if it could, the costs of the counterclaim were costs "in the action."

The costs of a caveat and appearance to the warning, though incurred before writ issued, are "costs in the Probate action."

(1) 11 Ir. C. L. R. App. 26. (2) Before ANDREWS, J.

Q. B. Div. 1900.

CRAIG v. BOYD.

The costs of citations to legatees may be allowed in a proper case, although the executors of the will under which the legatees claim are before the Court.

Additional names should not be inserted, as of course, in a writ of subpœna once it has been issued and sealed. If it is desired to insert additional names, a corrected præcipe should be lodged, and the writ resealed.

The mere fact that a witness has not been subpœnaed is no ground for disallowing his expenses or the costs of attending on him to take his evidence.

If the country solicitor of a party, or his assistant, is a necessary witness at the trial in Dublin, the mere fact that the solicitor has a registered address in Dublin is not a sufficient ground for disallowing their travelling expenses and the solicitor's fee for attendance as a witness.

A witness coming to Dublin by rail should only be allowed the actual fare paid, although it is less than the ordinary fare, as where he travels by an excursion train.

MOTION TO REVIEW TAXATION.

This was an application on behalf of the plaintiff for an order that the Taxing Master review his taxation of the defendant's costs of the action allowed him by the order or judgment dated April 20, 1899, in respect of certain items in the defendant's bill of costs.

The facts of the case and the items objected to, and the arguments of counsel, are sufficiently set out in the judgment.

Andrew Todd, for the plaintiff.

Cooke, Q.C., for the defendant.

Dec. 10.

ANDREWS, J.:—

This was a motion on behalf of the plaintiff for a review of the taxation of the defendant's bill of costs. The plaintiff was the executor of Wm. Craig, deceased, and by his statement of claim he propounded a will of the testator dated the 30th September, 1897. The statement of defence, though in form only a defence, was, as to portion of it substantially a counterclaim, because the defendant by way of special defence propounded an earlier will of the 6th Feb., 1894. This was in accordance with the practice of the Court that where a defendant relies on an earlier will he must propound it. The plaintiff in his reply alleged the revocation of the will of 1894 by each of three wills, not only by the will of the 30th September, 1897, but by two other wills made earlier in that year. Inasmuch

as none of these wills could effect a revocation unless properly executed, the pleadings were framed to raise the question of the validity of all four wills.

The action came on for trial before the late Mr. Justice O'Brien on the 19th and 20th April, 1899, and resulted in a judgment in favour of the will of the 30th September, 1897. The parties thereupon consented that all the issues respecting the other wills should be withdrawn. The Judge then ordered that "both parties" (*i.e.* plaintiff and defendant) "do have their costs necessarily and properly incurred in this action, when taxed and ascertained, out of the assets."

The taxation of costs did not come before the Taxing Master until June, 1900. If the question now raised before me was present to the mind of the plaintiff or his advisers at the time the Judge made this order, I regret that it was not mentioned. It seems to me, however, that it was an afterthought, and that no one imagined, when the Judge gave the defendant his costs of the action out of the assets, that he was not to get all his costs. Unfortunately, there can be no application now to the Judge to amend the order.

The question is now raised by counsel for the plaintiff, that the words "costs in this action," given by the judgment, do not include the costs of the counterclaim. No such question was raised before the Taxing Master, nor is it referred to in the notice of motion. *Sparrow* v. *Hill* (1) was relied on as entitling the plaintiff to rely on this question without notice, but that case is no authority for this contention. It only decides that, if the objection is to the principle of the taxation, particular items need not be specified in the objection, not that the subject of the objection may be relied on without notice. The plaintiff is not entitled to rely on this objection, but lest it should be supposed from my saying no more that I attach any weight to it, I shall examine it. The question is one of construction, viz. what is comprised in the words "costs in this action," as contained in the judgment of O'Brien, J. Order XIX., Rule 3, is as follows:—"A defendant in an action may set-off, or set-up by way of counterclaim against

(1) 7 Q. B. D. 362.

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the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim will have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both in the original and on the cross claim."

This rule was to prevent the necessity of separate actions where the cross claim can be conveniently tried in the same action as the claim: both are tried in one action, with claims on each side, and all the costs incurred are incurred in that "action." No new title even of a counterclaim is required, unless the counterclaim brings in other persons. This is provided for by Order XXI., Rule 11 (Judicature Act, 1877, section 27, sub-sects. 3, 7: even in that case it is still one action with cross claims). The policy of the Judicature Act is to dispose of in one action all matters in controversy between the parties thereto. As an illustration of how far this has been carried, I may refer to *The Manchester and Sheffield Railway Co.* v. *Brooks* (1) and *Arthur* v. *Arthur* (2). Lord Esher, then Brett, L.J., said in *Winterfield* v. *Bradnum* (3): "I think the true mode of considering the claim and counterclaim is that they are wholly independent suits, which for convenience of procedure are combined in one action." This was cited with approval by Fry, J. in *Beddall* v. *Maitland* (4), and by Naish, L.J. in *Griffiths* v. *Patterson* (5). The cases referred to by Mr. Todd, including *Ward* v. *Morse* (6), *Baines* v. *Bromley* (7), *Shrapnel* v. *Laing* (8), and others, are, in my opinion, no authorities on the construction of the words "costs in this action" in the judgment of O'Brien, J. They show that in certain circumstances, in order to effect justice in the incidence of costs as between the parties, a claim and a counterclaim are to be treated as separate actions, but they are not authorities to show that, where there is a claim and counterclaim, and the judgment gives a party "his costs in the action," he is not to have all his costs incurred in the action, in which both a claim and counterclaim

(1) 2 Ex. D. 243.
(2) 3 L. R. Ir. 1.
(3) 3 Q. B. D. 324.
(4) 17 Ch. D. 182.
(5) 22 L. R. Ir. 665.
(6) 23 Ch. D. 377.
(7) 6 Q. B. D. 691.
(8) 20 Q. B. D. 334.

were tried. In passing, I may refer to what Lord Esher said in *Shrapnel* v. *Laing* (1), at p. 337, with reference to objections to a taxation, that upon an application to review taxation "it is necessary that the person who seeks a review should show that he has taken his objection to the taxation when before the Taxing Master." This is not limited to objections to items. It extends to all objections to the taxation, and any other rule would be against one of the first principles of justice, viz. that a party is entitled before being called on to meet a case or defend himself against a claim, to be informed before he comes into Court what it is he is to meet or defend himself against; but I desire to add that if the objection I have been dealing with had been open to the plaintiff, I would have overruled it.

I now come to the objections which were taken before the Master, in so far as they are relied on in the notice of motion to review his taxation.

Items 2 to 8. These items are small in amount; they are the costs of drawing and entering a caveat, and of appearance to the warning of the caveat. It was objected before the Taxing Master that these items were costs before action brought. The Taxing Master overruled this objection. The defendant was not only entitled, but bound, to lodge the caveat. Order LXXIX., Rule 53, provides that "any person intending to oppose the issuing of a grant of probate or letters of administration must lodge a caveat in the principal registry, or in a district registry." Although probate suits are now instituted under Order I., Rule 1, and Order II., Rule 1, by an action commenced by a writ of summons, I think the existing practice (which, as I understand, corresponds with that prescribed by rule 15 of the Probate Orders of 1865, Contentious Business) should continue, and that the expense attending the entry of the caveat and warning (which are "costs incident to the proceeding") should in taxation be still considered costs in the cause, whether that rule is to be regarded technically as a subsisting rule or not: see Order LXXXV., Rule 2. I accordingly overrule the objection to these items.

Items 48–65. These items relate to the costs of the citations

(1) 20 Q. B. D. 334.

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of Elizabeth Park and Alice Stevenson, and were objected to before the Taxing Master, and the objection was overruled by him. The defendant relied upon, and therefore was bound according to the settled practice to propound, the will of 1894, and, in order to sustain it, it was necessary for him to oppose the three wills of 1897, the validity of each of which was in question in the action. The citation of Elizabeth Park, who was interested as a legatee under two of the wills of 1897, and the citation of Alice Stevenson, who was interested as a legatee under each of the wills of 1897, were, in my opinion, under the particular circumstances of this case, reasonable and proper, notwithstanding that the persons cited were also legatees under the will of 1894, and that an executor of each of the four wills was a party to the action. I therefore overrule the objection to these items.

Item 86. "*Subpœna ad testificandum*, thirteen witnesses, £1 5*s*." It was objected before the Taxing Master that no more than 6*s*. 8*d*. should be allowed for the subpœna directed to Sarah Hester, as the original subpœna and præcipe only contained her name; but this objection was overruled. The practice as to subpœnas in probate actions is, I am informed, against adding names after the writ has been issued and sealed, without resealing it, and I entirely approve of that practice. Order XXXVII., Rule 32 (Amending subpœna), impliedly prohibits even the correction of an error in names, without lodging a corrected præcipe and having the writ resealed. It has been stated that a different practice prevails in relation to subpœnas in common law actions. If so, I know of no authority for it, and I entirely disapprove of it. I think it is against the intention and spirit of Order XXXVII. (Part III., Subpœna), and, as in the present case, adding twelve additional names without lodging a corrected præcipe, or having the writ resealed was, as I am informed, against the practice in probate actions, I can only allow 6*s*. 8*d*. for this item, and I disallow 18*s*. 4*d*., the remainder of the charge in item 86. For the same reason I must disallow the charges of 1*s*. each for copies for service on ten persons, whose names were so added, viz. items 89, 91, 93, 95, 97, 99, 102, 104, 106, and 109, and I reduce the £2 charged for services in item 101 to £1, and the £1 charged for services in item 108 to 10*s*. It does not follow, however, that the expenses of these witnesses are to be

disallowed, and I overrule the objections to all the other items from 89 to 111, save as to 110, which I shall afterwards refer to.

Item 112. "Attending fourteen witnesses, taking notes of their evidence, £4 13*s.* 4*d.*" I overrule the objection to this item. It does not follow that an attendance on a witness, to take his evidence, is to be disallowed merely because he has not been subpœnaed.

Item 166. This was a sum paid to the defendant, a doctor, for railway fare and car hire. I overrule the objection to this item. The question was one of amount which it was for the Taxing Master to determine.

Items 167, 168, and 171 to 184, 187, and 188. These relate to witnesses' expenses. I overrule the objection to these items, save as to 178, which I shall refer to afterwards. As I have already said, it does not follow that a witness's expenses are to be disallowed merely because he has not been subpœnaed, and I was not referred to any satisfactory evidence that any of these witnesses had other business which would have brought them to Dublin.

Items 178 and 110. These were expenses and viaticum paid to Rev. T. B. Morris. It is admitted that £1 has been allowed in excess of what was paid to this witness, and therefore I allow this objection.

Items 185 and 186. These were expenses paid to a solicitor's assistant, who was in the employment of the defendant's solicitor. It was objected that he was not entitled to expenses, as his employer's registered address was in Dublin. There is no such strange rule as that the expenses of a solicitor's clerk actually living in the country and coming to Dublin as a witness are to be disallowed merely because the solicitor who employs him has a registered address in Dublin. The general objection to these expenses was not seriously pressed.

Item 186. It is admitted that 5*s.* too much has been by mistake allowed to this witness, and therefore I allow the objection.

Items 189, 190. These were sums charged for the attendance and travelling expenses of the defendant's solicitor. I overrule the objections to these items; the presence of the solicitor was required as a witness, and it was for the Taxing Master to fix the amount. With reference to the objection which was made before me, that

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some of the witnesses charged for were not named in the defendant's advice of proofs, I do not find that any such objection was made before the Taxing Master, and I therefore decline to entertain it: see Order LXV., Rule 65 (3). They may have been material witnesses, but I hold that, whether such an objection is presented as an objection to items, or an objection on principle, it should be made on the taxation.

Items between 166 and 190. With reference to the objection that sums have been allowed in these items for travelling expenses in excess of the fares actually paid (by excursion train), the affidavit of John Perry has not been contradicted, and having regard to that affidavit, and the positive statement in the second paragraph thereof, I feel bound by Order LXV., Rule 64 (11) (Scale of witnesses expenses), last paragraph but one, which provides that "the above scale does not include reasonable travelling expenses *actually paid*, which may be allowed in addition," to disallow the excess, which I estimate at 8*s.* 6*d.* each for six witnesses, amounting to £2 11*s.*

As regards the question of the double viaticum, stated to have been paid to Alice Stevenson and William Graham, I do not find any objection sufficiently directed to this, and I decline therefore to entertain this question.

I have gone into the amounts of the deductions which I have allowed in addition to those allowed by the Taxing Master in order to save the parties the expense of a reference back to the Master to review his taxation, and the further delay which it would involve. The additional deductions allowed by me amount to £6 14*s.* 4*d.*, and I shall therefore order that the sum of £190 0*s.* 10*d.*, being the certified amount of the defendant's costs, be reduced by the sum of £6 14*s.* 4*d.*, and I shall declare that the defendant is entitled to receive out of the assets of the deceased the sum of £183 6*s.* 6*d.*, and no more, in respect of the defendant's taxed costs which were incurred in this action, and allowed to him out of the said assets by the judgment in this action, dated the 20th April, 1899, and I shall direct that the parties respectively do abide their own costs of this motion.

Solicitor for the plaintiff: *John M'Cay.*

Solicitor for the defendant: *William Wilson.* W. L.

BROWNE *v.* RYAN (1).

Q. B. Div. 1900.
May 4, 5, 8, 9. June 16.
Appeal. Nov. 6, 7, 23.

Mortgage—Collateral agreement—Once a mortgage always a mortgage—Clog on equity of redemption—Independent deed binding mortgagor to sell lands and give sale thereof to mortgagee, an auctioneer, and to pay a commission on the proceeds of sale, if sold by another.

Where land has been mortgaged as a security for money, when the money is paid off, the land and its owner in the use of it, must be as free as if it had never been mortgaged, and provisions in the mortgage deed, or collateral thereto, inconsistent with this right, cannot be enforced.

The defendant mortgaged his land to the plaintiff to secure a loan of £200 and interest thereon. The money was raised by the mortgagee by depositing the mortgage as security with a bank. As part of the same transaction the defendant agreed by an independent deed to sell his land within twelve months, and to give the sale thereof to the plaintiff, who was an auctioneer, and that if the said lands were sold otherwise than through the plaintiff he would pay the plaintiff five per cent. on the purchase money. The defendant subsequently sold the lands through another auctioneer for £1250:—

Held, by the Queen's Bench Division (Andrews, J., *diss.*), that the plaintiff was entitled to recover £62 10*s.* on the agreement.

Held, by the Court of Appeal (reversing the decision of the Queen's Bench Division), that the collateral advantage stipulated for by the mortgagee in the independent deed placed such a fetter on the equity of redemption that it vitiated the agreement.

NEW TRIAL MOTION.

The writ of summons was endorsed with a claim "for £62 10*s.* money payable by the defendant to the plaintiff under a deed made on June 21, 1898, between the plaintiff and defendant, whereby it was agreed that the sale of certain lands therein particularised belonging to the defendant should be given to the plaintiff, the said lands to be put up for sale by public auction within twelve months from the date of the said deed, and the defendant to pay the plaintiff the usual commission of £5 per cent. upon the amount of the purchase-money; and in the event of the said lands being sold

(1) In the Queen's Bench Division, before LORD O'BRIEN, L.C.J., and ANDREWS, GIBSON, and KENNY, JJ.

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otherwise than through the agency of the plaintiff, to pay to the plaintiff £5 per cent. on the amount of the purchase-money. The said lands were sold on September 22, 1898, for the sum of £1250, the commission on which at £5 per cent. is the said sum of £62 10s."

The defence stated that the deed of June 21, 1898, formed part of one transaction with a deed of mortgage of the lands, the sale of which was referred to, and that the terms thereof were contrary to the policy of the law and void, and that it was unfair and unreasonable. The defence also alleged that the defendant had no independent advice. At the trial, which took place before the Lord Chief Baron, it was proved that the defendant applied to the plaintiff for a loan of £200, and that for the purpose of raising this sum the defendant gave to the plaintiff a mortgage of the lands of Curragh Feakle in the statutory form, dated June 16, 1898. This mortgage was deposited with the Bank by Browne, and the Bank on the security of this equitable deposit advanced to Browne the sum of £200, which he lent to Ryan. Subsequently, on June 21, 1898, the deed containing the agreement sued upon in this action was executed. It was in the following terms:—"Agreement made this 21st day of June, 1898, between Patrick Ryan of Ryaninch, in the county of Tipperary, farmer, of the one part, and John Browne of Mount Pellier, in the county of Limerick, auctioneer, of the other part, Witnesseth: that Whereas the said Patrick Ryan is about selling the lands of Curragh Feakle, in the county of Clare; And Whereas the said John Browne has advanced the sum of £200 on the security of the said lands to the said Patrick Ryan, He the said Patrick Ryan agrees to give the sale of the said lands to the said John Browne, said lands to be put up for sale by public auction within 12 months from the date hereof, and to pay to the said John Browne the usual commission of £5 per cent. on the amount of the purchase-money, and in the event of the said lands being sold otherwise than through the agency of the said John Browne, to pay unto the said John Browne £5 per cent. on the amount of such purchase-money. In WITNESS," &c.

It was admitted at the trial that the consideration for the agreement sued on was the same £200 as is mentioned in the

mortgage of June 16, 1898; and it was proved that the mortgage and the deed now sued on formed part of one transaction; that the mortgage was signed on June 16, and finally delivered then; that the money was got from the Bank on June 21, and on the same day, and after the agreement was signed, it was given to the defendant. The lands were sold to a purchaser named Purcell by the defendant for £1250 through another auctioneer, and the £200 borrowed from Browne was repaid, and by deed dated 19th November, 1898, Browne reconveyed the lands discharged from all claims under the deed of mortgage. The conveyance to Purcell was dated August 24, 1899. The oral evidence at the trial will be found fully stated in the judgment of Mr. Justice Kenny, *infra*, p. 656.

The Lord Chief Baron was of opinion that the defendant thoroughly understood that he contracted to give the sale of the lands to the plaintiff, and that if he sold through another he was to pay the plaintiff £5 per cent. on the purchase-money, but the learned Judge held that the transaction was in its essence a mortgage, and that the sale of the lands was to be for the benefit of the mortgagee *inter alios*, and that the defendant was entitled to redeem his obligation under the covenant to sell, as well as to redeem the lands; and further that if the plaintiff was not entitled to insist upon a sale, he could not be entitled to fees as on a sale, and consequently the learned Judge held that the covenant to pay the £62 10*s.* was in the nature of a clog upon the equity of redemption, and not such a collateral advantage as could be bargained for by a mortgagee. The Lord Chief Baron, therefore, found a verdict for the defendant and entered judgment for him.

The plaintiff moved for an order that the verdict and judgment should be set aside, and judgment entered for the plaintiff for £62 10*s.*, or for a new trial.

Matthew J. Bourke, *Q.C.*, and *P. Kelly*, in support of the application.

Wylie, *Q.C.*, and *P. Law Smith*, for the defendant.

Cur adv. vult.

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KENNY, J.:—

This case has been argued before us at considerable length, and the authorities dealing with the subject of fettering, or as it is sometimes called "clogging," the equity of redemption of a mortgage have been elaborately discussed. The facts of the case are of the simplest character. In June, 1898, the defendant required a sum of £200, and he went to the plaintiff, who is an auctioneer, with the view of getting him either to lend him the amount, or to assist him in procuring it. The latter method was adopted. The plaintiff and defendant obtained the amount from a local Bank on the plaintiff's security, accompanied by the equitable deposit of a formal deed of mortgage of the lands which had been executed by the defendant to the plaintiff for the express purpose of facilitating the arrangement with the Bank. That mortgage on the face of it purports to be made in consideration of £200 advanced by the plaintiff to the defendant—the grant of the lands is to the plaintiff—and it is expressed to be for the purpose of securing payment on the 16th December then next of the said sum of £200, with interest at £7 per cent., reducible to £6 per cent. Cotemporaneously with the obtaining of the loan from the Bank an agreement dated the 21st June, 1898, which is sued on in this action, was executed by the defendant. [His Lordship read the agreement, as set out *ante*, p. 654.]

The oral evidence as to the transaction was given by Mr. Coffey, the solicitor who acted for both parties, and by the defendant himself. It appears from that evidence that the arrangement was that, in consideration of the plaintiff procuring the advance from the Bank, the defendant was to give him the sale of the lands, and pay him the usual commission of £5 per cent., the defendant to be bound to sell the place within a year, and if sold otherwise than through the plaintiff, to pay the plaintiff £5 per cent. on whatever purchase-money would be realised by the sale; that the mortgage and the agreement were to carry out the same transaction, and that actually at the time of entering into the agreement with the plaintiff, the defendant had agreed to sell the farm to a Mr. Purcell, through the agency of Mr. Fitt, another auctioneer, but had never communicated that circumstance to the solicitor, Mr. Coffey. The defendant having further stated that

it was the sale to Purcell that was ultimately carried out, we asked to see copies of any documents relating to the agreement with and the sale to Purcell, and we have been furnished with three. The first is dated the 22nd September, 1898, and is an agreement for sale signed by the defendant and Purcell for £1250, and £31 5s. auctioneer's fees. The second, which is stated to be supplemental to the mortgage, is dated 19th November, 1898, and is a reconveyance from the plaintiff to the defendant, on payment of all principal money and interest due under the mortgage, and is expressly made "discharged from all principal money and interest secured by and from all claims and demands under the said indenture of mortgage." The third is a conveyance dated the 24th August, 1899, of the lands by the defendant to Purcell. I am unable to reconcile the date of the written agreement of the 22nd September, 1898, with the defendant's statement that in June, 1898, he had actually agreed with Purcell for the sale to him, and that the sale ultimately effected was under that agreement, unless on the assumption that there were two agreements with Purcell, and that the first fell through. Two inferences may, however, in my opinion, fairly be drawn—the one that the substantial inducement and consideration for the plaintiff's services in obtaining the advance, and for the advance itself, was the contract for the auctioneer's commission; the other (on the defendant's admission) that, while dealing with the plaintiff on the basis of a prospective sale, he had already entered into an agreement for the sale through another auctioneer. It does not appear that the plaintiff ever received a penny of interest on the loan. Indeed I rather think it was admitted at the bar that the local Bank was either paid by the defendant its discount for the sum advanced, or that it retained it out of the advance. Consequently the plaintiff received no benefit of any sort from the transaction, while the defendant got the advantage of the plaintiff's credit at the Bank. The present action is brought to recover the commission which the defendant agreed to pay in case he sold otherwise than through the plaintiff, and it is met with the very technical defence on equitable grounds that this promise on the defendant's part to pay commission operated as a "fetter" on the defendant's right to redeem under the mortgage, and is absolutely void. A case more completely devoid of merits

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than the defendant's is it is hard to conceive, and unless it can be conclusively brought within the authorities which enable a man to escape his liability under an agreement, because it offends against some principle that jealously guards a mortgagor's right of redemption, I think we should, in the language of Romer, J., in *Biggs* v. *Hoddinott* (1), enforce the doctrine "that a man shall abide by his contracts, and that a man's contracts shall be enforced as against him."

When one comes to consider how the authorities now stand on the subject of undue and inequitable fetter on the equity of redemption, one is somewhat perplexed by the various combinations of circumstances that have been held on the one hand to create the inequitable fetter, and on the other not to give rise to it, while the *ratio decidendi* in some of the decisions cannot be invoked as establishing or recognising any great or vital principle of law. No case to which we have been referred is in its facts at all like the present one, and it therefore becomes necessary to consider whether in its circumstances there is to be found such a violation of equitable doctrine as to be a bar to this action. Moreover, it must never be left out of consideration that, while the vast number of the authorities cited were all cases in equity in which either the right to foreclosure or to redemption was sought to be enforced, or in which the accounts between the mortgagor and mortgagee had to be taken, the present case is one in which redemption has actually taken place, in which no charge or right is asserted against the mortgaged property, and in which the action is simply brought to enforce the performance of a collateral obligation. The maxim "once a mortgage always a mortgage," the adoption of which by Courts of Equity embodied the favour and protection extended to an equity of redemption, in my judgment, calls for no application here. The object of the rule was to prevent oppression. Contracts made with the mortgagor to lessen, embarrass, or restrain the right of redemption were regarded with jealousy, and, according to Mr. Kent in his Commentaries (4 Kent Com. Lect. 58, 158, p. 173 of the 11th Ed.) were "generally set aside as dangerous agreements, founded in unconscientious advantages

(1) [1898] 2 Ch. at p. 313.

assumed over the necessities of the mortgagor." The cases in which the doctrine has been applied can be referred to instances in which the stipulation was repugnant to the nature of an equity of redemption, or penalised the right to redeem, or resulted in a collateral advantage to the mortgagee. *Jennings* v. *Ward* (1) was a case of a collateral agreement with respect to other property, which was held to be unconscionable. *Broad* v. *Selfe* (2) was a question of account; and certain commission for which the mortgagee had stipulated was disallowed. In *Edward's Estate* (3) there was an agreement by the mortgagor to sell to the mortgagee. In *Chapple* v. *Mahon* (4) there was also an agreement—held to be oppressive—for commission in case of redemption. The mortgage in *Comyns* v. *Comyns* (5) contained a covenant for payment to the mortgagee of £100 a-year for management. *James* v. *Kerr* (6) was decided against the mortgagee on the ground that the proviso for redemption included payment of a bonus as well as principal and interest; and in the last case on the subject, *Rice* v. *Noakes* (7), the mortgagor succeeded—so far as I can see—on the somewhat shadowy ground that the stipulation which was held to be a clog on redemption was not within the proviso for redemption. But those cases do not by any means exhaust the authorities on the subject. Of late years there has been a marked tendency on the part of the Court of Appeal in England to discard the doctrine of "collateral advantage" when the Court is satisfied that the mortgaged property was made a security for the carrying out of the collateral advantage. In *Potter* v. *Edwards* (8) only £700 was advanced, and the security was given for £1000, and was held good for that sum. In *Mainland* v. *Upjohn* (9), Kay, J. (who had previously decided *James* v. *Kerr* (6)), following *Potter* v. *Edwards* (8), allowed in the account between mortgagor and mortgagee certain sums deducted by the latter by way of commission when making advances—such deductions being made as part of the mortgage contract. The question

(1) 2 Vern. 520.
(2) 11 W. R. 1036.
(3) 11 Ir. Ch. R. 367.
(4) Ir. R. 5 Eq. 225.
(5) *Ibid.* 583.
(6) 40 Ch. D. 449.
(7) [1900] 1 Ch. 213.
(8) 26 L. J. (N. S.) Ch. 468.
(9) 41 Ch. D. 126.

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came more definitely before the Court of Appeal in *Biggs* v. *Hoddinott* (1), and *Santley* v. *Wilde* (2), two very important cases which show the extent to which in England, at least, the stringency of the older authorities relating to collateral advantages to the mortgagee have undergone modification. Both cases establish that a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fettered, and the bargain is a fair and reasonable one.

In *Biggs* v. *Hoddinott* (1), the mortgagors had entered into a covenant that, *during the continuance of the security*, which was to be for five years, they would deal exclusively with the mortgagee for all beer and malt liquor sold on the mortgaged premises. The mortgagors within the five years ceased to purchase from the mortgagee, and claimed to be entitled to redeem. Romer, J., and the Court of Appeal held that the mortgagee was entitled to an injunction to enforce the covenant to purchase beer, and that such a covenant did not in any way clog the equity of redemption. Romer, J., further held—and from that decision there was no appeal—that the mortgagors were not entitled to redeem. The observations of the Judges in that case are very pertinent to the present. Romer, J., at p. 314, says:—"The mortgagors' right to redeem under the mortgage-deed stands exactly the same, whether this covenant to take the beer from the mortgagee is in the deed or not. The mortgagee, by virtue or in respect of that covenant, has no right to stop or check redemption. He could not stop redemption, because there had been any breach of that covenant. There is no charge upon the mortgaged premises in favour of the mortgagee for any sums which might become due to him under, or by virtue, or by reason of, any breach of that covenant by the mortgagors." In the Court of Appeal (3) the *dictum* of the Master of the Rolls (Sir J. Trevor) in *Jennings* v. *Ward* (4), that "a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement," was considered too wide when relied on as a general proposition

(1) [1898] 2 Ch. 307.
(2) [1899] 2 Ch. 474.
(3) [1898] 2 Ch. at p. 322.
(4) 2 Vern. 520.

without reference to the special facts of the case, which showed that the particular stipulation was regarded as "unconscionable," and was set aside as being "unreasonable." The Master of the Rolls (Sir Nathaniel Lindley), at p. 321, says:—"A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest, and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case where collateral advantages have been disallowed which does not come under one of these two heads." Chitty, L.J., in deciding that the covenant in no way affected the equity of redemption, says:—"It is not stipulated that damages for breach of the covenant shall be covered by the security, and redemption takes place quite independently of the covenant, so this is not a case where the right to redeem is affected. . . . I think the cases only establish that the mortgagee shall not impose on the mortgagor an unconscionable or oppressive bargain"; and, finally, Collins, L.J., says:—"On what principle can any stipulation in a mortgage-deed, which does not fetter the right to redemption, be held invalid? I think only on the general principle that effect will not be given to what is unconscientious and oppressive." *Santley* v. *Wilde* (1) seems to me to go still further, for while Romer, J., and Chitty, L.J., in *Biggs* v. *Hoddinott* (2), partly base their judgments on the absence of any charge on the mortgaged premises in respect of the damages for breach of the covenant creating the collateral advantage,—the proviso for redemption in *Santley* v. *Wilde* (1) expressly provided for the collateral advantage being also within the security. Being part of the bargain in pursuance of which the mortgagor advanced his money, and being one of the conditions in the proviso for redemption, the Court held the mortgagor to his agreement, and declared that he was not entitled to redeem on mere payment of principal and interest. Romer, L.J., says: "There is no such principle as is suggested, namely, that a mortgagee shall not stipulate for any collateral advantage for himself. He may so stipulate, and if he does he may obtain a collateral advantage.

(1) [1899] 2 Ch. 474. (2) [1898] 2 Ch. 307.

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Nothing can be said against it, and he can enforce it, always assuming that the bargain is not unconscionable or oppressive."

I have already referred to *Rice* v. *Noakes* (1), in which Cozens-Hardy, J., reviewed the two cases which I have just mentioned and held in favour of the mortgagor. If these latter cases are good law I confess to finding great difficulty in distinguishing them in principle from the facts in *Rice* v. *Noakes* (1), in which, I may add, an appeal has been taken, and will probably be disposed of within a few days.

But whether the law, as it was assumed to be before *Biggs* v. *Hoddinott* (2), or as it is now applied under these English cases—be regarded as governing the present case, I am of opinion that the agreement sued on is perfectly valid, and that the plaintiff is entitled to recover the amount claimed by him. There is nothing oppressive or unconscionable in the stipulation for commission in case of a sale otherwise than through the plaintiff as auctioneer. The carriage of the sale was the real consideration for the plaintiff's services in procuring the loan, and unless he recovers this commission he will have lent either his credit or his money without a return of any sort. The obligation to pay this commission does not attach to the mortgaged premises either expressly, or as an equity, under the authority of *Tulk* v. *Moxhay* (3), referred to by Cozens-Hardy, J., in *Rice* v. *Noakes* (1), and the damages are in no sense a charge on the lands. How then can it be said that it operates as a fetter or clog on redemption? The fact that redemption has taken place on payment merely of the principal sum secured, and that the mortgagor has had his property reconveyed to him in the same state as it was at the date of the mortgage, ought to be a sufficient answer. In cases such as *Chapple* v. *Mahon* (4) there was an element not only of oppressiveness, but of restriction on the right of redemption. The present case involves no question but that of an advantage to the mortgagee which, though it may be called collateral, is the only one derived by him. I am of opinion there is no rule of law which, in the circumstances of the case, compels him to relinquish it, and that judgment ought to be entered for him for the full amount claimed in the writ of summons.

(1) [1900] 1 Ch. 213. (2) [1898] 2 Ch. 307. (3) 2 Ph. 774. (4) I. R. 5 Eq. 225.

GIBSON, J.:—

The material facts, the details of which have been stated by Kenny, J., are these: the mortgagor who was negotiating a sale and intended to sell, applied to the mortgagee, an auctioneer, to raise money he stood in immediate need of, on bills with the Bank; the inducement to the mortgagee to assist was the profit he would receive by way of commission on the sale, and to secure such profit the mortgagor contracted to sell within a year; the sale took place, the mortgage was redeemed, and the action is based, not on any equitable relief sought by the mortgagee, but entirely on the collateral engagement. This could not be enforced specifically; it did not bind the mortgaged premises, and it could only be made good, in the event of breach, by compensation in damages. If the mortgage had been a trust for sale (*Re Alison* (1)), with a provision enabling the mortgagee as auctioneer to charge commission, the transaction would have been unquestionably within *Santley* v. *Wilde* (2), and the auctioneer would have been entitled to his commission. In a business point of view and in substance, looking at the facts and documents together, how in money result does the present case differ from such a trust for sale?

The question before us is whether the form of conveyancing adopted compels us to hold that the equity of redemption was fettered. It is unfortunate that the decision of the case should depend on forms and words, but equity often relies on verbal distinctions. Of late, however, the current of authority has set in favour of holding people to their bargains. Many of the rusty generalities so long prevalent and supposed to have become substantive law have been dispelled. The doctrine that a collateral benefit (in addition to payment of principal and interest) is inconsistent with the nature of a mortgage has been swept away. The rule, however still remains, that the equity of redemption, where it exists, cannot be fettered. But though it cannot be fettered, the period of redemption may be postponed, or the equity of redemption may be framed in such a way that it cannot arise at all during the continuance of the mortgaged estate. According to *Santley* v. *Wilde* (2), the principle by which a clog on

(1) 11 Ch. D. 284. (2) [1899] 2 Ch. 474.

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the equity of redemption is tested, is repugnancy between the equity of redemption and the supposed fetter. If this be correct, a little ingenuity on the part of the draftsman in modifying the right of redemption will enable the mortgagee in that case, to keep clear of difficulty. The old formula that a stipulation for collateral benefit was invalid, though dangerously loose—gave a real protection. It could not well be evaded by conveyancing, still why a mortgagor after the usury laws were repealed was supposed to require any protection where there was no oppressive or unfair dealing, passes my comprehension.

Santley v. *Wilde* (1) is an authority which it is our duty to follow, but it assumes that the objection of fetter on the right to redeem is still in certain cases applicable. An example would be where, as in *Chapple* v. *Mahon* (2), the exercise of the right to redeem was penalised. *Rice* v. *Noakes* (3), at present under appeal, supplies another illustration. There it was held that a tie imposed on a public-house could not be allowed to subsist after redemption. The tie directly affected the mortgaged property, and by diminishing its value might be considered as repugnant to the express right of redemption. It imposed a specific burthen on the mortgaged premises continuing after redemption. Whether this authority was rightly decided, having regard to the deed of mortgage construed as a whole, I am not concerned to consider, as it is not in point in this case, where the obligation is purely collateral, and could not affect a purchaser of the property in the hands of the mortgagor. The only authority which seems directly to touch the facts now before us is *Broad* v. *Selfe* (4), but this decision is distinguishable on two grounds: the suit was brought by the equitable mortgagee to obtain the equitable relief of foreclosure; and Lord Romilly held that the commission, which was not a charge on the premises, the mortgagor having withdrawn his authority to sell, was not enforceable as being a collateral advantage—a ground of decision which must be taken to be unsound.

Whether the contract to sell was a fetter on the equity of redemption must therefore be determined on principle. Had the

(1) [1899] 2 Ch. 474.
(2) I. R. 5 Eq. 225.
(3) [1900] 1 Ch. 213.
(4) 9 Jur. (N. S.) 885.

contract been that, if the mortgagor sold, he would employ the auctioneer, that would not have been a clog. The point therefore turns on the circumstance that the mortgagor bound himself to sell.

For the following reasons I think that the action cannot be resisted on the ground of fetter. The obligation was personal and collateral; it did not bind the lands. The mortgagor has sold, not under pressure of his mortgage contract, but in pursuance of his previously expressed intent. The contract to sell was never broken; the mortgagor was all through entitled to redeem, and the collateral engagement was not repugnant to nor did it penalise the equity of redemption. The effective consideration for the mortgage in the mortgagee's eyes was the commission. On the facts and deeds together there was no real fetter any more than there would have been if the transaction had been carried out by a trust for sale. Suppose the power of redemption here had been postponed for a year so that the contract to sell would have preceded the right to redeem, would *Santley* v. *Wilde* (1) have applied or not?

No authority has been cited which directly governs the present case. *Broad* v. *Selfe* (2), which resembles the facts here most closely, was decided, not on the ground of fetter, but on the principle of collateral advantage.

The transaction was fair, and I decline to stretch or go beyond the decided cases for the purpose of invalidating an honest bargain. The present state of our mortgage law on this subject of fetter seems artificial and arbitrary. The law, as settled by authority, I obey; but I do not feel at liberty to enlarge its borders and to extend it to a new case. I appreciate my brother Andrews' view, which a few years ago would have been accepted as unquestioned law: but recent cases have given us more liberty and freedom, and sacredness of contracts, always dear to the common law, if not to the Legislature, are beginning to make their voice heard at last in equity.

ANDREWS, J. :—

The mortgage by Ryan to Browne of the 16th of June, 1898, to secure an advance of £200 and interest, and the agreement between them of the 21st of the same month were, admittedly,

(1) [1899] 2 Ch. 474. (2) 11 W. R. 1036.

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parts of, and together constituted one mortgage transaction. Under the mortgage, Ryan was entitled to redeem the mortgaged lands on payment of the mortgage-debt and interest; but according to that agreement he was bound—1, to have the lands put up for sale by auction within twelve months; 2, to give the sale to Browne, as the auctioneer; 3, to pay Browne £5 per cent. commission on the amount of the purchase-money, and, 4, if the lands should be sold otherwise than through Browne, still to pay him £5 per cent. on the amount of the purchase-money.

It is stated in the agreement that Ryan was "about selling the lands," but it does not appear that outside this agreement he was then under any binding contract to sell them. His subsequent sale of them to Purcell was under a contract of sale of the 22nd September, 1898, and this action was brought by Browne for £62 10*s*., the commission at £5 per cent. on £1250, the purchase-money on that sale which was carried out through another auctioneer, Fitt. The fact that Browne, as Ryan knew, obtained the £200 to be advanced to Ryan from a Bank, to which Browne became liable for that amount, does not appear to me to be material with reference to the question we have to decide, viz. whether the obligations imposed on Ryan by the agreement of the 21st of June, 1898, were binding on him, having regard to the law relating to collateral advantages stipulated for by a mortgagee in a mortgage transaction. It appears that the mortgaged lands were an ample security for the advance of £200, as they were actually sold for £1250. Browne knew the liability he incurred to the Bank, with whom the mortgage was deposited by way of collateral security, by which Browne was kept safe against any loss in the transaction, and, even if the interest of seven, reducible to six per cent., reserved by the mortgage, only covered the interest charged by the Bank for the advance (as to which, however, I find nothing in the evidence), the question to be decided does not depend on whether Browne will have no profit out of the transaction if he does not receive the commission he has sued for. The question is whether, on the facts of this case, he is entitled to that commission. Nor can the question to be decided on the facts of this case be determined by ascertaining on which side the merits or demerits lie, or whether under

some different form of mortgage, or some different form of contract between the parties, Browne could have legally secured an equivalent advantage to that which he claims.

The case must, in my opinion, be dealt with on its own facts, as they stood at the time of the mortgage transaction. Although the law respecting what collateral advantages may, and what may not, be legally stipulated for by a mortgagee in a mortgage transaction has in recent times, and especially since the abolition of the laws against usury, been much less stringently interpreted, the equitable principle of "once a mortgage always a mortgage" remains. You cannot at the same time take a mortgage and stipulate for some advantage inconsistent with the nature of a mortgage. This is recognized as existing law by Collins, L.J., in the recent case of *Biggs* v. *Hoddinott* (1), in the Court of Appeal, in his judgment (at p. 323 of the report), where he says:—"It is clear that a mortgage, in the view of a Court of Equity, is simply a loan on security, and nothing inconsistent with that can be imported into the deed; and Hargreave, J., in *Re Edwards' Estate* (2), probably had in his mind the principle that provisions inconsistent with the nature of a mortgage are illegal. Lindley, L.J., says in his judgment in the same case (1) (at page 321 of the report):—"A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest, and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case, where collateral advantages have been disallowed, which does not come under one of these two heads." I venture to think that the learned Lord Justice did not by using the words, "preventing such redemption," intend to convey that impeding or fettering such redemption would not be invalid, as preventing the full redemption to which on payment of principal, interest, and costs the mortgagor is entitled.

It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage (in the present case the mortgaged lands) to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is

(1) [1898] 2 Ch. 307. (2) 11 Ir. Ch. R. 367.

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prevented from doing so, that which he is entitled to on-redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact, the equity of redemption is affected by what, whether very aptly or not, has been always termed "a clog."

Now, how was Ryan's right of redemption affected under the agreement of the 21st of June, 1898? According to that agreement, if the mortgage debt should remain outstanding for twelve months, though the mortgage would be still a mortgage, his right on redemption to get back the mortgaged lands would be gone. It would be both prevented and annihilated; he was bound by the agreement to sell by auction within twelve months. If he redeemed within twelve months he would not get back the land to hold and enjoy it as he was entitled to do before the mortgage. He would get it back with a superadded obligation to sell it by auction within the twelve months, and in either case the agreement purported to bind him, in addition to paying the principal and interest of the mortgage debt, to pay Browne a further sum equal to £5 per cent. on what the lands should be sold for, whether it was sold through Browne or not. This sum it now appears would be equal to more than 30 per cent. on his advance. Although it may be admitted that these obligations cannot be properly regarded as charges on the land, they would nevertheless directly and seriously affect the mortgage with respect to the land, and his rights in relation to it. They were not made part of the terms on which he would be entitled to redeem, and from their nature, could not have been, for they are inconsistent with any redemption if the mortgage debt should remain outstanding for twelve months; and, if the mortgagor should redeem within the twelve months they are inconsistent with his right on redemption to hold and enjoy the lands as he was entitled to do before the mortgage. No case that has been cited, and no case that I know of, goes the length of saying that such stipulations as these are enforceable by a mortgagee against his mortgagor. I cannot but regard them, as the Lord Chief Baron did, as in the nature of a clog on redemption, and therefore in my opinion the verdict was rightly directed for the defendant, and ought not to be disturbed.

The judgment of Cozens-Hardy J., in the case of *Rice* v. *Noakes* (1) which, so far as I know, is the most recent one on this subject seems to me to be in favour of the opinion I have arrived at in the present case. *Rice* v. *Noakes* (1), however, is under appeal, but even if it be reversed it will not, as it appears to me, conclude the present case, which is not an identical one. The fetter on the enjoyment of the property in *Rice* v. *Noakes* (1) still left the property with the mortgagor. What I regard as the fetter in the present case would take the property away from the mortgagor altogether, notwithstanding his right of redemption; and if Browne could not enforce that part of the agreement by which he sought to bind Ryan to sell the land within twelve months, he could not, in my opinion, recover what he bargained for as commission on the sale. *Santley* v. *Wilde* (2) was a very special and peculiar case, and differed from the present one. As was observed by Cozens-Hardy, J., in *Rice* v. *Noakes* (1), the proviso for redemption in *Santley* v. *Wilde* (2) was in fact nugatory. By the contract between the parties it would only come into operation when, by the expiration of the lease, there would be nothing to redeem, and as the mortgage in that case secured the discharge of future recurring obligations, the right to redeem would not arise while any of those obligations remained undischarged. *Broad* v. *Selfe* (3) has, in some of its features, much resemblance to the present case, but I do not base my judgment upon it, nor do I think it necessary to examine the comments which have been made upon it in other cases. The ground of the Vice-Chancellor's decision in *Chapple* v. *Mahon* (4), apparently was that the stipulation that if there was a redemption of the mortgage in that case, or if the defendants were removed as agents over the mortgaged property they should receive a commission of 5 per cent. on the sums advanced, with 10 per cent. interest on the commission, was oppressive; but although it was not a charge on the lands, he held it to be a clog upon redemption. My judgment, however, is not based upon any particular case, but on what I regard as the still existing law as between mortgagor and mortgagee, and I have therefore refrained from any further references to or comments

(1) [1900] 1 Ch. 213.
(2) [1899] 2 Ch. 474.
(3) 9 Jur. (N. S.) 885.
(4) I. R. 5 Eq. 225, 232.

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upon particular cases on the subject, as I do not find what I regard as the still existing law dissented from in any of them, and it appears to me to be either expressly or impliedly recognised in almost all of them.

LORD O'BRIEN, L. C. J. :—

I agree in the result arrived at by my brothers Kenny and Gibson, and generally adopt their reasons. The right to redeem was neither hampered nor penalised, nor were the lands in themselves in any way onerated; in fact, Ryan redeemed: he got back the lands on paying principal and interest; and there was no charge or blister created on the lands themselves. There was a personal obligation on Ryan to do what was the main object of the transaction, namely, to sell. The mortgage was a mere temporary expedient to get money pending the sale. We must look at the real character of the transaction; and I should like to express in a few words the view that struck me from the outset. What is this transaction? A most ordinary every day transaction. A man who owns a farm wants money, and he goes to an auctioneer and says, "I am about to sell my farm, get me the loan of so much money, and you will have a certain commission on the purchase-money of the farm." I venture to say there are several hundred transactions of this sort in this country every year—it is at all events a very ordinary one. Well, the auctioneer goes to a bank, and by pledging his credit and depositing a mortgage, which in order to facilitate the transaction the man who wants the money makes to him, he gets the money, and gives it to the owner of the farm. The interest is paid to the Bank. The auctioneer does not get a penny of interest. The auctioneer gives his time trouble and credit, in getting the money. The owner of the farm gets all he is contractually entitled to. The auctioneer does not get one penny of money in hand, and the somewhat discredited doctrine of "clog" is invoked to prevent his getting anything for his time, trouble, and the use of his credit. He is to be deprived of the very consideration for which he entered into the contract. The owner of the farm is to be permitted to utilize the contract so far as it operates for his benefit, and have recourse to the doctrine of clog to deprive the

auctioneer of the sole and only benefit that it was stipulated he was to get as a consideration for what he was to do. This appears to me to be injustice in its most rank and crude shape—to be pushing altogether too far the doctrine of clog, and to defeat inequitably and oppressively one of the most ordinary transactions of our rural life.

There was no question whatever of overreaching, or dishonest or improper practice by Browne, and it was not for a moment suggested that the defendant Ryan did not fully understand what he was doing. Ryan takes all and gives nothing. So far from keeping him to his contract, he is, it is said, to be allowed to avail himself of the benefit of the contract, and to repudiate all liability which the contract imposed on him. This, in my opinion, is oppressive and unconscionable; in fact, the doctrine of clog, which was invented by Courts of Equity to prevent oppression and unconscionable conduct is invoked to effectuate that which it was designed to prevent. This, in my judgment, should not be. I agree with my brothers Kenny and Gibson.

A. E. R. J.

Appeal. Nov. 6, 7, 23.

The defendant appealed to the Court of Appeal (LORD ASHBOURNE, C., FITZ GIBBON, WALKER, and HOLMES, L.JJ.)

Wylie, Q.C., and *P. Law Smith*, for the appellant:—

The agreement sued upon was an attempt by the mortgagee to secure a collateral advantage beyond the principal and interest secured by the mortgage, which cannot be supported as legal. The principle on which this agreement is illegal is explained in *Mainland* v. *Upjohn* (1), by Kay, J., who cited the authority of Lord Eldon in *Chambers* v. *Goldwin* (2). In *Field* v. *Hopkins* (3) it was held that an auctioneer-mortgagee could not contract validly with the mortgagor that the mortgage should secure besides the principal and interest a fee of five guineas for a valuation made by the auctioneer prior to and for the purposes of the mortgage. This

(1) 41 Ch. D. 126. (2) 9 Ves. 254. (3) 44 Ch. D. 524.

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case was decided expressly on the principle enunciated in *Jennings* v. *Ward* (1) that a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the equity of redemption with any by-agreement. Lord Bramwell in *Salt* v. *Marquis of Northampton* (2) admits the existence of the rule, though he says he does not understand it. He states the rule to be "that this right of redemption shall not even by bargain between the creditor and debtor be made more burdensome (to the debtor) than the original debt, except so far as additional interest and expenses consequent on the debt not having been paid at the time appointed may have occurred or arisen: that any agreement making such right of redemption more burdensome is void." The agreement in this case plainly violates the rule so stated, because it would impose a liability on the mortgagor which he could not escape from on repayment of the loan and interest.

Biggs v. *Hoddinott* (3) is distinguishable, because the covenant there ceased to bind the mortgagor on repayment of the loan and interest. It was only a covenant that during the continuance of the security, *i.e.* until repayment of the loan, the mortgagor would deal with the mortgagees only for liquors. There was no charge on the mortgaged premises of any sum which might become due under or by virtue of a breach of the covenant. Therefore, if the mortgagor redeemed, his liability under the covenant immediately ceased. On the other hand, *Rice* v. *Noakes* (4), which was also the case of a "tied house" is undistinguishable in principle from the present case, because there "the tie" would have survived the redemption of the mortgage and left the premises bound by the covenant after the repayment of the loan; and for this reason it was held that the covenant was a violation of the equitable rule.

In *Santley* v. *Wilde* (5) the lease was assigned by the mortgagor to the mortgagee as security not only for repayment of the loan and interest, but also for the payment of one-third of the profits of under-leases to the end of the term. It was a security for the loan, and also for the profit rents which the mortgagor had agreed to sell to the mortgagee.

(1) 2 Vern. 520.
(2) [1892] App. Cas. 1.
(3) [1898] 2 Ch. 307.
(4) [1900] 1 Ch. 213; 2 Ch. 445.
(5) [1899] 1 Ch. 747; 2 Ch. 474.

Matthew J. Bourke, *Q.C.*, and *P. Kelly*, for the respondent:—

There is nothing unconscionable in this agreement: the plaintiff got no benefit from the mortgage: if he is not entitled to the money sued for under the agreement he will receive no consideration for the money with which he provided the defendant.

We admit that the rule of equity as expressed in the decisions down to the year 1890 is against allowing the plaintiff to recover on this agreement. But since that date the current of authority shows that the rule was stated too broadly in the earlier cases. The statement in *Ward* v. *Jennings* (1) that a man shall not have interest for his money and a collateral advantage besides for the loan of it has been condemned as too sweeping by Romer, J., in *Biggs* v. *Hoddinott* (2). The older cases in which this rule was stated were really not decided upon it, but on some other equity. Thus, *Chapple* v. *Mahon* (3) was the case of the mortgagor and mortgagee being client and solicitor, where there was an unconscionable bargain; *Comyns* v. *Comyns* (4) was the case of a mortgagee in possession; *James* v. *Kerr* (5) was a case of an unconscionable bargain; *Mainland* v. *Upjohn* (6) was the first case in which the old rule was questioned; *Field* v. *Hopkins* (7) was the last case decided before the modification of the law. *Biggs* v. *Hoddinott* (2) is a distinct modification of the old rule that the mortgagee could stipulate for nothing but principal, interest, and costs. That case decides that the mortgagee may stipulate for a collateral advantage secured by a personal covenant provided the damages are not secured on the equity of redemption: it practically overrules *Broad* v. *Selfe* (8), one of the earlier cases which most resembles the present in its facts. *Santley* v. *Wilde* (9) goes a step further and shows that what would formerly have been held void as a clog on the equity of redemption may be valid if it forms part of the bargain to secure which the mortgage was granted. In *Rice* v. *Noakes* (10) no doubt the collateral advantage stipulated for by the mortgagee was held invalid, but that was because the covenant

(1) 2 Vern. 520.
(2) [1898] 2 Ch. at p. 310.
(3) I. R. 5 Eq. 225.
(4) *Ibid.* 583.
(5) 40 Ch. D. 449.
(6) 41 Ch. D 126.
(7) 44 Ch. D. 524.
(8) 9 Jur. (N. S.) 885.
(9) [1899] 2 Ch. 474.
(10) [1900] 1 Ch. 213; 2 Ch. 445.

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restricted the user of the mortgaged property even after redemption. It was not a merely personal covenant as in *Biggs* v. *Hoddinott* (1). The deed sued on by the plaintiff does not bind the land; the mortgaged property went back free from this demand on redemption: the amount due on the agreement is not secured on the land. If the plaintiff had brought a suit to realise the amount of his mortgage by a sale he could not have recovered this £62 10*s.* out of the proceeds of the sale of the lands. He could only sue for this sum in a personal action. The result of the recent cases is to show that this is now the test as to what collateral advantages may be bargained for by mortgagees.

Cur. adv. vult.

Nov. 23.

LORD ASHBOURNE, C.:—

In this case the judgment of the Court will be delivered by Lord Justice Walker.

WALKER, L.J.:—

In this case Patrick Ryan, a farmer, had an intention of selling the lands of Curragh Feakle, which he owned. The plaintiff John Browne is an auctioneer. Ryan wanted a sum of £200 which Browne agreed to give, or procure for him on the security of a mortgage of the farm. Accordingly by a deed dated the 16th June, 1898, between Patrick Ryan of the one part and John Browne of the other—a mortgage in the statutory form—Ryan (in consideration of £200 expressed to be paid by Browne to Ryan) conveyed the lands to Browne for securing payment, on the 16th December, 1898, of the principal sum of £200, with interest at £7 per cent., and also an obligation if the principal was not paid, to pay interest at same rate on every 16th June and 16th December, reducible to £6 per cent. if punctually paid.

An agreement under seal was also made which was admitted to form part of the mortgage transaction. It bears date the 21st June, 1898. It is in the following terms:—Whereas the said Patrick Ryan is about selling the lands of Curragh Feakle,

(1) [1898] 2 Ch. 307.

in the county of Clare, and whereas the said John Browne has advanced the sum of £200 on the security of the said lands to the said Patrick Ryan, he the said Patrick Ryan agrees to give the sale of the said lands to the said John Browne, said lands to be put up for sale by public auction within twelve months from the date hereof, and to pay to the said John Browne the usual commission of £5 per cent. on the amount of the purchase-money, and in the event of the said lands being sold otherwise than through the agency of the said John Browne, to pay unto the said John Browne £5 per cent. on the amount of such purchase-money.

In point of fact the money was procured from the Bank of Ireland on the security of the lodgment of the mortgage. It is admitted that the parties must be treated as occupying the relation towards each other of mortgagor and mortgagee, and that the agreement must be read as if contained in the mortgage-deed. Patrick Ryan paid off the £200 before the day of redemption arrived, and obtained a reconveyance, dated the 19th November, 1898, by which Browne reconveyed the lands "discharged from all principal money and interest secured by and from all claims and demands under the said indenture of mortgage."

Patrick Ryan having thus got up the lands, did not sell them within the twelve months, but he did sell them in 1899 for a sum of £1250; and he did not employ Browne as auctioneer. The conveyance, which is to a man named Purcell, is dated the 24th August, 1899.

The plaintiff thereupon claimed the sum of £62 10*s.* as being payable to him as commission under the terms of the mortgage agreement.

The defendant contends that the obligation created by the agreement was a fetter on the equity of redemption which cannot be enforced, and the Chief Baron, before whom the case was tried without a jury, was of that opinion, and entered a verdict for the defendant. In the Queen's Bench Division, on a motion to set aside the verdict and enter judgment for plaintiff, Mr. Justice Andrews concurred in opinion with the Chief Baron, but the other Judges, the Lord Chief Justice, and Gibson and

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Kenny, JJ., were of a different opinion, and directed the verdict to be entered for the plaintiff. We have now to decide between these conflicting views. It is not material to consider what our decision would be if there were not in existence long established rules of Courts of Equity governing the relations between mortgagor and mortgagee, and putting limitations on the stipulations which may be contained in a contract of mortgage. Nor is it material to consider whether such rules had their origin in the laws against usury, because in substantial matters they have survived the abolition of the usury laws. The question is, 1, what the rules of Courts of Equity were in relation to contracts between mortgagor and mortgagee made in connection with the mortgage transaction; 2, how far those rules have been invaded by decisions in recent times not easy to reconcile with each other; and, 3, whether the present case falls within a principle lying at the foundation of the rules, and which, when rightly understood, is unaffected by any decision. As I understand the principle, it is that when a transaction appears, or has been declared to be a mortgage, Courts of Equity regard the instrument only as a security for the repayment of the principal, interest, and costs named and secured, and the mortgagor is entitled to get back his property as free as he gave it, on payment of principal, interest, and costs, and provisions inconsistent with that right cannot be enforced. The equitable rules, "once a mortgage always a mortgage," and that the mortgagee cannot impose any "clog or fetter on the equity of redemption," are merely concise statements of the same rule.

I think it has been long settled, and is still the law, that, when once the redemption price has been fixed and arrived at, the mortgagee cannot charge against the mortgagor on account as a charge against the estate to be redeemed any extra payments for commission for himself or otherwise. That rule is distinctly stated by Lord Eldon in *Chambers* v. *Goldwin* (1), and is followed in *Broad* v. *Selfe* (2), and also in *Comyns* v. *Comyns* (3), and this, though the bargain for the extra payments may have been deliberately made; such a charge by its mere statement clogs the

(1) 9 Ves. 254. (2) 9 Jur. (N. S.) 885; 11 W. R. 1036; 2 N. R. 541.
(3) I. R. 5 Eq. 583.

equity of redemption, and involves an assertion that there shall be no redemption till the extra demands are paid.

It is true that there are observations as distinct from decisions which go to the full extent that a mortgagee cannot stipulate for any collateral benefit for himself, even though the stipulation is not oppressive or unconscionable. Such are the observations of the Master of the Rolls in *Jennings* v. *Ward* (1), of Judge Hargreave in *Edwards' Estate* (2), and of the Master of the Rolls in *Broad* v. *Selfe* (3), and apparently also the language of Kay, J., in *Field* v. *Hopkins* (4), decided in January, 1890. In this last case the mortgagees were a solicitor and an auctioneer. There was a foreclosure suit which it was conceded had the same incidents as a suit for redemption. The charges in question included a fee for the valuation of the property by the mortgagee-auctioneer, and Kay, J., assuming that the right to make the charge was covered by a recital in the mortgage deed, held that it was not recoverable. He says (at p. 529):—

> "Can a mortgagee stipulate for more than his principal, interest, and costs by a recital of this kind, it being clear that this remuneration would not have been payable but for this recital? It is said by Lord Romilly in *Gregg* v. *Slator* (25 L. J. Ch. 440), and by myself in the recent case of *In re Roberts* (43 Ch. D. 52), that where a solicitor-mortgagee tries to charge against his mortgagor professional costs in connection with the preparation of the mortgage, such a charge has been disallowed, because he is not claiming costs paid to another person, but he is claiming them for himself, and, as the mortgagee is only liable to pay outgoings, he is not bound to pay anything charged by the solicitor for his own benefit. Therefore, this sum charged by the auctioneer as incidental to the preparation of this mortgage is not a proper charge, unless it is covered by the recital I have read. Then comes the question, Can a mortgagee contract for payment to himself of a profit-payment to which, but for such a contract, he would not be entitled? The matter has been considered in many cases. It is only necessary for me to refer to my own judgment in *James* v. *Kerr* (40 Ch. D. 459), where I quoted the language of the Master of the Rolls in *Jennings* v. *Ward* (2 Vern. 520), that "a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement? That decision has since been followed

(1) 2 Vern. 520.
(2) 11 Ir. Ch. R. 367.
(3) 11 W. R. 1036.
(4) 44 Ch. D. 524.

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in a great many cases: and I go on in my judgment to state that 'in *Broad* v. *Selfe* (11 W.R. 1036) Lord Romilly decided that this rule was not affected by the repeal of the usury laws, and he disallowed a commission for which the mortgagee had stipulated in addition to his principal and interest.' Until those decisions are reversed I shall feel bound to follow them. Accordingly, the five guineas taken by the auctioneer-mortgagee, which he could not possibly have claimed without a special contract, could not be the subject of a valid contract. According to the mortgage law recognised in this country, a mortgagee cannot make such a contract: he cannot contract to get anything from the estate beyond his principal, interest, and costs: therefore profit-charges, which he is not entitled to be paid, stand on the same footing as commission, which he clearly cannot charge."

In the Court of Appeal the Judges disposed of the point by holding that the right to make the claim was not covered by the deed, and it was not necessary to go further. So stood the law up to the year 1890, and Mr. Bourke, in his argument, admitted that if the case depended on the decisions up to the year 1890, the plaintiff must fail. But he said the covenant is not found to be oppressive or unconscionable: damages recovered under it are not made a charge on the estate: it is merely a personal and collateral benefit given to the mortgagee, and therefore within the principle of *Biggs* v. *Hoddinott* (1); *Santley* v. *Wilde* (2); therefore the commission secured by the covenant is recoverable; and he further contended that the result would be the same if there had been a personal covenant that a sum of £100 should be paid by the mortgagor to the mortgagee if the lands were redeemed by him. It may be that those two cases indicate a new departure, but we must see how far they have travelled. They certainly have not interfered with the maxim "once a mortgage always a mortgage," or any case which really falls within that rule. In the first place they profess to save it whole, and in the next place the decision of *Salt* v. *Marquis of Northampton* (3), decided in November, 1891, is an express authority, that the rule remains in full force. Lord Bramwell seems to regret the introduction of the rule, as one which interferes with free contract, and he describes

(1) [1898] 2 Ch. 307. (2) [1899] 1 Ch. 747; 2 Ch. 474.
(3) [1892] A. C. 1.

it as follows, the "right of redemption shall not even by bargain between the creditor and debter be made more burdensome to the debtor than the original debt, except so far as additional interest and expenses consequent on the debt not having been paid at the time appointed may have occurred or arises: that any agreement making such right of redemption more burdensome is void: for instance, £1000 out at £5 per cent. payable in six months on mortgage, with a proviso that if not paid in six months the right of redemption should not be exercised, except on payment of £6 per cent. interest, would be void."

The facts in *Biggs* v. *Hoddinott* (1) must be examined in order to understand the case. Biggs was a brewer, and the defendants were owners of an hotel, and Biggs lent them £7654, which was secured by a mortgage of 18th March, 1896, repayable with interest at 5 per cent. on 18th September, 1896, and the defendants covenanted that during the continuance of the security they would deal with the plaintiff for all beer and malt liquors consumed on the premises. There was a proviso that the loan should not be called in or paid off for five years. The deed in no way charged any money payable for beer, &c., on the premises. In the spring of 1898 the defendants ceased to purchase beer, &c., from the plaintiff, and claimed to be entitled to redeem the mortgage at once, and tendered all moneys due, and as the plaintiff declined it, the defendants took out an originating summons to compel redemption, and the plaintiff then brought his action, claiming an injunction restraining the defendants during the continuance of the security from selling any liquors not purchased from plaintiff and for damages. It was first held that the clause precluding redemption for five years was valid, as had already been decided in *Teevan* v. *Smith* (2) and this disposed of the redemption summons.

The case was then argued on the plaintiff's motion for an injunction. Mr. Justice Romer, after pointing out that the covenant was a reasonable and proper one under the circumstances, first recognised the principle that you cannot by contract clog the equity of redemption, so as to prevent the mortgagor redeeming at

(1) [1898] 2 Ch. 307. (2) 20 Ch. D. 724.

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the time agreed on, on payment of principal, interest, and costs, and he next held that there was nothing in the covenant which clogged the right of redemption. He says :—

> "The mortgagor's right to redeem under the mortgage deed stands exactly the same whether the covenant to take the beer from the brewer, the mortgagee, is in the deed or not. The mortgagee, by virtue of that covenant, has no right to stop or check redemption. He could not stop redemption, because there had been any breach of that covenant. There is no charge upon the mortgaged premises in favour of the mortgagee for any sums which might become due to him under or by virtue, or by reason of any breach of that covenant by the mortgagors "—

and he there held that the observations in some of the cases cited which appeared to lay down that a mortgagee could not stipulate for any collateral advantage were too wide and not necessary for the decisions.

The decision of Romer, J., was affirmed in the Court of Appeal on the same ground, viz. (to use the language of Chitty, L.J.) :—

> "That it in no way affects the equity of redemption, for it is not stipulated that damages for breach of the covenant shall be covered by the security, and redemption takes place quite independently of the covenant, so this is not a case where the right to redeem is affected"—

and when once the collateral covenant was free from that character, it being reasonable and proper, it was valid, though contained in the mortgage deed.

It will be observed that the covenant there was limited to the continuance of the security, and the obligation under it so limited in no way interfered with the rights as owner of the mortgagor. When the stipulated time for redemption arrived and redemption took place, the covenant fell with it and the nature of the obligation was quite collateral, and had nothing in its character which prevented him redeeming. It would be quite a different matter if the obligation to take the beer—in other words, the position of a tied house—survived redemption under the contract. The case is certainly an authority that fair collateral contracts in a mortgage deed for the benefit of the mortgage which do not prevent or burden redemption or interfere with the position of a free owner

after redemption are valid. The case of *Santley* v. *Wilde* (1) is on its facts more difficult to deal with, though I see nothing in the grounds on which the decision is stated to be rested as distinct from the decision itself, which cannot be accepted.

In *Santley* v. *Wilde* (1), Miss Santley was sub-lessee of a theatre with an *option* of purchasing a reversionary term for £2000. She borrowed the money for the purpose on a mortgage of the term to secure the £2000 and £6 per cent. interest. The reversionary term would expire in June, 1905, and the mortgage money was made repayable by instalments, the last of which would be payable four and a-half years before the expiration of the term. The mortgage was made redeemable on payment of the £2000 and interest and all other payments covenanted to be paid, and the deed contained a covenant to pay to the mortgagee one-third of the net profit rental of the theatre during the whole of the mortgagor's term, which would outlast the time for redemption. Byrne J., held that the clause securing the one-third of the profits during the whole term operated to prevent redemption and was void, and that such a provision could not enable the mortgagee to maintain any action for specific performance or account or for damages. The Court of Appeal reversed that decision. The Master of the Rolls states the ground of his judgment as follows: after reading the document he says (2):—

> "That means that this lease is granted or assigned by the mortgagor to the mortgagee as security, not only for the payment of the £2000 and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principle which I have laid down, that does not clog the right of redemption upon the performance of the obligation for which the security was given. But it is said that is not good law. Those, however, who say so lose sight of the true principle underlying the expression that there must be no clog or fetter on the equity of redemption. The plaintiff says, 'I will pay off the balance of the £2000 and interest, and you will give me back the lease, and this is the end of my obligation.' But the mortgagee says, 'No, that is not the bargain, you cannot redeem on those terms; on the contrary, you may pay me the £2000 and interest, but if you do you must also pay the one-third profit rents.' On principle that is right."

(1) [1899] 1 Ch. 747; 2 Ch. 474. (2) [1899] 2 Ch. at p. 476.

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In other words, they held that the equity of redemption only arose upon the performance of the stipulation to pay one-third of the profits during the whole term, as well as the other stipulations. Collins, L.J., in the last case, *Rice* v. *Noakes* (1), treats *Santley* v. *Wilde* (2) as deciding that the one-third profits was part of the subject matter of the security. If that was the true interpretation of the redemption clauses, there was no fetter on the equity of redemption.

The last case on this subject, *Rice* v. *Noakes* (1), puts the true limitations on what was decided in *Biggs* v. *Hoddinott* (3). It was a mortgage of a leasehold public-house to a brewer. The mortgage money and interest were repayable on demand, but the deed contained the following covenant—

> "And for the considerations aforesaid the mortgagor, so as to charge the premises hereby demised into whosesoever possession they may come, whether by act of the party or by operation of law, or by any other ways or means however, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not, nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises any malt liquors except such as shall be *bona fide* purchased by the mortgagor of the company. And further, that if and whenever there shall be a breach of the said covenant, he, the mortgagor, shall and will pay to the company the sum of £1000, as, and for ascertained liquidated damages for each such breach."

The question argued was, whether the plaintiff was entitled to get a reconveyance on payment of all moneys due under the mortgage free from the obligation of his house remaining a tied house during the currency of the lease. Cozens-Hardy, J., decided in favour of the mortgagor on the ground that the tie, though valid during the continuance of the security, could not be maintained when all moneys due upon the security had been paid off, and that it was involved in the very idea of a mortgage, that a mortgagee when paid off, should have no estate or interest in the mortgaged premises, and

(1) [1900] 1 Ch. 213; 2 Ch. 445. (2) [1899] 1 Ch. 747; 2 Ch. 474.
(3) [1898] 2 Ch. 307.

no right to interfere with the mortgagee in his enjoyment or user of the premises. He says at p. 219:—

> "The negative covenant or 'tie' is expressed to be a 'charge' on the premises. I doubt whether this phrase is strictly accurate. The precise operation of such a covenant has been described in different ways. Lord Cottenham, in *Tulk* v. *Moxhay* (2 Ph. 774) calls it an 'equity attached to the property by the owner.' Sir George Jessel in *London and South Western Railway Co.* v. *Gomm* (20 Ch. D. 583) calls it 'an equitable burden.' This much at least is clear, that in the hands of the plaintiff and of any person taking with notice, this covenant imposes a fetter upon the enjoyment of the property, and materially lessens its value."

The decision of Cozens-Hardy, J., was affirmed on appeal on the ground that what was mortgaged was the house without any tie, and that the covenant put it out of the power of the mortgagee to give back to the mortgagor on redemption that which he was bound to return to him, viz. the unincumbered term. Lord Alverstone says:—

> "Whatever may be the proper expression, in my opinion the covenant impairs or affects the mortgaged property, so that the mortgagor will not get it back on redemption. It impedes his right to redeem and rescue that which was his own at the time he mortgaged it."

He adds:—

> "Speaking for myself, I should have had a difficulty in arriving at the same conclusion as the Court of Appeal did in *Santley* v. *Wilde*, on the facts of that case."

I own I confess to the same difficulty, but let us now apply the principles involved in the equitable rule which I have first stated, and those which can be collected from the decision in *Rice* v. *Noakes* (1), to the present.

The covenant is not that if the mortgagor sells he will employ the plaintiff as auctioneer, nor is the covenant limited to the continuance of the security, or even made an incident to an act enforcing by sale the security. The whole covenant must be considered, and it is not material that the parties might have arrived at practically the same end by using other language.

(1) [1900] 1 Ch. 213; 2 Ch. 415.

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The first obligation is that the mortgagor shall sell within twelve months. That is a period which outlasts the time for redemption, and attaches an obligation by covenant on the owner to sell, whether he liked it or not, after (on the assumption) he had got back his property free. The liability under the covenant sued on only arises in the event of his not selling within the twelve months.

I do not think it material that this "tie" on the rights of the owner arises through a liability to damages under a covenant as distinct from a burden which a Court of Equity can attach on the lands, or on him in respect of the lands, on the principle of *Tulk* v. *Moxhay* (1). Equally he is under a burden in respect of his own ownership arising from an obligation alleged to be in force after that ownership should be after redemption free.

I am of opinion that, without at all relying on the rule laid down in the earlier authorities that a mortgagee cannot stipulate for any collateral benefit to himself, this case offends against the principle which underlies the case of *Rice* v. *Noakes* (2), and that the decision of the Queen's Bench Division should be reversed, and the judgment given by the Chief Baron at the trial restored.

It follows that the appeal must be allowed with costs in this Court and in the Queen's Bench Division.

FITZ GIBBON, L.J. :—

As this appeal involves the consideration of an important rule of equity, it is my duty to add a few words. We were pressed with the argument that there has been a change in the rule since 1890. In my opinion the rule, stated in the form in which it applies to the present case, has undergone no change. The essential principle of the rule is, I believe, that where land has been mortgaged as a security for money, when the money secured is paid off, the land, and its owner in the use of it, must be as free as if it had never been mortgaged. Any inroad upon the rule stated in that form must destroy it altogether; and I agree with Lord Justice Walker that, if it does not apply to this case, it must be treated as abrogated.

(1) 2 Ph. 774. (2) [1900] 1 Ch. 213; 2 Ch. 445.

The rule originated in that wider principle of equity under which the Court of Chancery interfered with contracts between parties who were not in a position to deal with each other on equal terms, *e.g.* "catching bargains" with expectant heirs, it being deemed inequitable that a lender should, through the necessities of a borrower, obtain any additional or collateral advantage affecting the right of redemption, beyond the payment of principal and interest and costs. Lord Bramwell's criticism only showed how firmly the principle was established, and though he made no attempt to conceal his dislike of it, he was constrained to act upon it in *Salt* v. *Northampton* (1).

Biggs v. *Hoddinott* (2), *Santley* v. *Wilde* (3), and *Rice* v. *Noakes* (4), do not mitigate or change the rule as I have stated it.

In *Biggs* v. *Hoddinott* (2), there was a covenant not to pay off the mortgage for five years, and also a covenant to deal with the mortgagee for all beer and malt liquors to be consumed on the mortgaged premises *during the continuance of the security.* An attempt was first made to show that the covenant not to redeem for five years was not valid; but, that point being closed by authority, it was next contended that the covenant to deal exclusively with the mortgagee during the continuance of the security was inequitable as an attempt by him to confer a collateral advantage upon himself contrary to the rule. But Romer, J. and the Court of Appeal held that this covenant was reasonable, that it left the mortgagor perfectly free to redeem at the stipulated time, and that it did not affect the equity of redemption. This decision did not infringe the rule as I have stated it, because, on payment of the principal, interest, and costs, in accordance with what were held to be the reasonable terms of the mortgage, the mortgaged property and its owner would become as free as if there had never been any mortgage.

In *Santley* v. *Wilde* (3), a loan of £2000 was secured by the mortgage of a leasehold term of years in a theatre, for a sum repayable by instalments. The mortgage was redeemable on repayment of the loan and all other moneys covenanted to be repaid by the mortgagor, and the mortgagor covenanted to pay to the

(1) [1892] App. Cas. 1.
(2) [1898] 2 Ch. 307.
(3) [1899] 1 Ch. 747; 2 Ch. 474.
(4) [1900] 1 Ch. 213; 2 Ch. 445.

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mortgagee one-third of the profits of the theatre during the residue of the term for which it was held, which would not expire for nearly five years after the date fixed for payment of the last instalment of the loan. The Court of Appeal decided that this one-third of the profits continued to be payable after the repayment of the last instalment of the loan. If that decision is considered upon the ground stated in the judgment of the Court of Appeal, it affirmed the principle that every mortgage security must be redeemable on discharge of the debt, any provision to the contrary notwithstanding; and that any provision inserted to prevent redemption on payment or performance by the mortgagee of the debt or obligation for which the security is given, is void. But the Court held, upon the facts and instrument in the particular case, that the covenant to pay to the mortgagor one-third of the profits of the theatre *during the stipulated term* was reasonable and valid, and, in effect, that this payment was only part of the stipulated mode of repaying the mortgage debt. I do not think that I could have taken that view of the facts, and I cannot distinguish, in equity, the position of the one-third *extra* profits there, after the payment of the last instalment, from that of the £62 10*s.* commission claimed on the sale of the redemption here. But the case makes no change in the rule; it only raises a difficulty in understanding its non-application to the particular case.

In *Rice* v. *Noakes* (1) the mortgagor mortgaged a leasehold public-house to a brewer to secure a loan with interest; and he covenanted to constitute the mortgaged premises a "tied house" for the residue of his term, which extended beyond the period for redemption. The mortgagor paid off the loan and interest, in accordance with the proviso for redemption, and he then claimed to have his public-house declared free from any further obligation under the covenant to deal with the mortgagee. Cozens-Hardy, J., held that when the money due on the mortgage was paid off, the mortgagor was entitled to have the premises reconveyed freed from this obligation; and this decision was affirmed by the Court of Appeal. It is not necessary for us to attempt to distinguish the facts of that case from those of *Santley's Case* (2). As a decision upon the force and effect of the rule of equity, it is, in my opinion,

(1) [1900] 1 Ch. 213; 2 Ch. 445. (2) [1899] 1 Ch. 747; 2 Ch. 474.

decisive of the present case. The covenant was held to have gone the moment the mortgage debt was paid off; the property and its owner in the use of it thereupon became as free as if there had never been any mortgage, and the same result must follow in the case of Ryan's covenant to sell his land, and to pay commission to Browne, after having redeemed the mortgage.

It is admitted that the deed which purported to secure the commission was "part of the mortgage transaction." We must take this admission in its natural sense, and we must deal with the case as if the provisions of this deed were contained in the mortgage, and were entered into in consideration of the advance. Thus the transaction, though a mortgage, purports to bind the mortgagor to sell the lands, whether redeemed or not, within twelve months; to give the sale to the plaintiff as auctioneer; and to pay him a commission of £5 per cent. upon the purchase money, whether the sale is carried out through him or not. This is plainly an additional and collateral advantage to the mortgagee, purporting to secure a further profit to him, over and above the repayment of his principal, interest, and costs: it affects the equity of redemption, because, if valid, it would compel the mortgagor afterwards, notwithstanding redemption, to sell the mortgaged property, and to pay part of the proceeds to the mortgagee. If enforceable, it would not leave the mortgaged property, or the owner in the use of it, free on repayment of the loan; but the property should be sold, and the price should be shared with the mortgagee.

The Lord Chief Justice says (1):—

> "The auctioneer gives his time, trouble, and credit, in getting the money. The owner of the farm gets all he is contractually entitled to. The auctioneer does not get one penny of money in hand, and the somewhat discredited doctrine of 'clog' is invoked to prevent his getting anything for his time, trouble, and the use of his credit. He is to be deprived of the very consideration for which he entered into the contract. The owner of the farm is to be permitted to utilize the contract so far as it operates for his benefit, and to have recourse to the doctrine of 'clog' to deprive the auctioneer of the sole and only benefit that it was stipulated he was to get as a consideration for what he was to do."

I answer, with all respect—the lender is estopped by his own

(1) *Ante*, p. 670.

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deed from saying that the consideration for the contract was not the loan of £200 at interest, and a mortgage to secure it. The necessary result in equity is that, on repayment of the loan with interest and costs, the property may be redeemed on the terms stated in the proviso for redemption; and the property, and the mortgagor in the use of it, must thenceforth be free. This agreement purports to bind the borrower to convert his property into money whether he redeems it or not; and, in addition to repaying the mortgage debt, it binds him to pay a commission to the mortgagee out of the purchase money. The application of the doctrine of "clog" to such a stipulation has, so far as I know, never been questioned, far less "discredited." I concur with Andrews, J., and I am clearly of opinion that the judgment for the defendant given by the Lord Chief Baron must be restored.

HOLMES, L. J.:—

If a farmer were to agree with an auctioneer, that in consideration of the latter procuring for him a loan from a bank, he would sell his farm within twelve months and pay the auctioneer a stipulated percentage of the purchase money, there would be no illegality nor invalidity in such a contract; and if it were broken, damages would be recoverable. The negotiations between the plaintiff and the defendant which preceded the present litigation opened upon the foregoing lines, and if they had terminated in such an agreement as I have indicated, there would probably have been no necessity for the present action. Unfortunately, however, the transaction assumed a different shape. The money which the plaintiff obtained from the bank was lent by him to the defendant on the security of an indenture of mortgage by which the farm was conveyed to the lender, subject to a proviso for redemption on payment at the end of six months of £200, the amount of the loan with interest thereon at £7 per cent. per annum, reducible to £6 per cent. in the event of punctual payment. As far as this deed is concerned, the transaction appears to be an ordinary mortgage with the incidents belonging to this kind of security. A few days later a further document was executed which has been already read. It is manifest from its contents, and indeed it is admitted by the plaintiff's counsel, that its provisions formed part

of the terms of the loan; and their effect is to bind the mortgagor to sell the mortgaged property within twelve months either through the instrumentality of the mortgagee or of another auctioneer, and to pay the mortgagee £5 per cent. of the purchase money obtained upon such sale.

I do not know why this mode of obtaining a loan for the defendant was adopted; and it is immaterial to inquire whether the plaintiff obtained or expected to obtain any advantage by assuming the position of lender, and having the mortgage made to himself.

It is enough that he became a mortgagee; and the rights and liabilities of the parties must be ascertained by reference to the rules of law applicable to mortgages. I do not understand the suggestion that the defendant was guilty of fraud in selling the farm through another auctioneer. This was contemplated by the terms of the contract, and unless a litigant is to be held guilty of fraud, because he seeks to rely upon a doctrine of equity which was intended for his protection, I can find no grounds for the imputation.

The decision of the matter in controversy in this action depends altogether upon the effect of the agreement for the loan taken in its entirety. In the first place, it was to be secured by mortgage, and this necessarily implies that upon repayment of the money advanced with interest and expenses, the borrower is entitled to have reconveyed to him his property freed and discharged from all liability or burden in respect of or arising from the contract under which the advance was made. But there were also the terms contained in the collateral agreement by which the mortgagor was obliged to sell the mortgaged premises within twelve months. How can such a stipulation co-exist with the right to redeem? It is not merely a clog or fetter in equity of redemption, but it is absolutely destructive of it. As a matter of fact the farm was redeemed by payment of principal and interest within the twelve months; but did the mortgagor then become the unfettered owner of his property? Certainly not. The effect of a contract must be estimated on the assumption that it is observed; and on this assumption the result would be, that the mortgagor after paying in full the principal and interest due would be obliged to sell

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his farm. So too if he had not redeemed within the year, the fulfilment of the contract on his part would have destroyed the possibility of redemption. I am unable to conceive any case that would come more completely and unequivocally than the present within the principle, that where a loan is secured by mortgage, the character of a mortgage—that is to say, the right to redeem—cannot be burdened or impeded. Unless it can be successfully argued, that absolute destruction of the right is no fetter on it, this case comes within the rule.

The only ground upon which the contrary has been argued is that the collateral agreement does not place any charge on the mortgaged lands; but there is no authority to support this distinction. On the contrary, the majority of the contracts that have been avoided by reason of their being inconsistent with the fundamental conception of a mortgage security were contracts that carried with them only personal obligation; and in the last reported case—*Rice* v. *Noakes* (1)—the Master of the Rolls declined to decide, as being immaterial, whether the covenant of the publican to deal with the brewery ran with the licensed premises or not.

It is not part of my duty to justify or explain the introduction into our jurisprudence of the rule that prevents the right of redemption being made more burdensome than what is necessarily involved in a contract by way of mortgage. It is now too firmly established to be weakened by judicial criticism; and I think that there is no reason for saying that it has been discredited in recent times, if by this expression it is meant that the rule has been disregarded or substantially modified. The last occasion on which it was considered by the ultimate tribunal of the kingdom was in the case of *Salt* v. *Marquess of Northampton* (2), heard by the House of Lords in the year 1891. The peers who then formed the Court included a very able and thorough-going champion of individualism, the late Lord Bramwell. As might be expected, he spoke with considerable severity of the double condition of things arising from legal rights and equitable rights, and of a system of documents which do not mean what they say. Yet he

(1) [1900] 1 Ch. 213; 2 Ch. 445 (2) [1892] App. Cas. 1.

announced the rule broadly and distinctly; and he acted on it, although he expressed regret to be obliged to give the decision to which it led. It would be superfluous for me after Lord Justice Walker's judgment, which I had an opportunity of reading before it was delivered, to examine the long succession of cases dealing with this branch of law; but as far as I can see, the argument for the plaintiff rests altogether on two authorities: *Biggs* v. *Hoddinott* (1), and *Santley* v. *Wilde* (2). Of these the former does not touch the point at all. A mortgagor of licensed premises was not entitled to redeem for five years, and it was held that a contract by him to deal exclusively with the mortgagee for malt liquor during that period was good. But he was entitled to redeem on the usual terms at the stipulated time, whereupon the obligation would terminate. *Rice* v. *Noakes* (3) shows by contrast the point of this decision; for in that case it was held that a similar contract could not be enforced after the time for redemption, and so as to fetter the right of redemption given by the mortgage.

As for the case of *Santley* v. *Wilde* (2), I admit that I am unable to reconcile it with what I understand to be the established rule of law. I follow the proposition laid down in the judgment of the Court; but the facts of the case seem to me not to fall within the proposition. It cannot, I think, stand together with the subsequent case of *Rice* v. *Noakes* (3); but even if it had the effect of modifying the law as previously understood, still the contract in the present case cannot be enforced if a shred of the old rule remains.

Solicitor for the plaintiff: *Connolly.*
Solicitor for the defendant: *Nash.*

G. Y. D.

(1) [1898] 2 Ch. 307. (2) [1899] 1 Ch. 747; 2 Ch. 474.
(3) [1900] 1 Ch. 213; 2 Ch. 445.

Q. B. Div. 1900.

Jan. 26.
Feb. 23.
June 5.

H. M. SECRETARY OF STATE FOR WAR *v.* BOOTH (1).

(1900. No. 16,727.)

Landlord and tenant—Lease for lives and term of years thereafter—Presumption of death of cestui que vie—7 *Wm.* 3, *c.* 8 (*Ir.*)—*Evidence—Costs—Liability of the Crown*—18 *&* 19 *Vict. c.* 90, *ss.* 1, 2.

The defendant held certain premises, under a lease made in 1770, for three lives (A, B, and C), and for sixty-one years thereafter. A and B died prior to 1837. C was, in 1770, aged nine years. The Secretary of State for War, as assignee of the lessor, served, in 1891, a notice to quit upon the defendant, and, on the 11th November, 1898, brought the present action of ejectment, founded on such notice. If C. was alive in 1837 (when he would have been seventy-six years of age) the lease would have been in subsistence at the date of the notice to quit. The plaintiff produced (*a*) some slight evidence of family reputation as to C's death, and (*b*) a recital, in a "memorial" (lodged in the Registry of Deeds office), of an assignment (in 1791) of a sub-lease of the same premises, setting forth that the original lease of 1770 was for the lives of A (then deceased) and his sons B and C, "who then or lately were in the East Indies, or elsewhere out of this kingdom."

On motion for judgment, pursuant to leave reserved at the trial:—

Held, that, this not being a case of pedigree, the evidence as to family reputation was inadmissible; that, even if the statement in the memorial were admissible in evidence as being against proprietary interest, it was not sufficient, within 7 Wm. 3, c. 8 (Ir.), to ground the statutory presumption that C, "having remained beyond the seas, or absented himself in the realm, for seven years, . . ." had ceased to exist; and that, accordingly, judgment should be entered for the defendant.

Held, further, that no order could be made for costs against the Secretary of State for War. *Re Beadle* (7 Ell. & Bl. 92) followed.

New Trial Motion.

Action to recover possession of certain premises in Ship-street, Dublin, held under an indenture of lease, dated 8th March, 1770,

(1) Before Lord O'Brien, L.C.J., Palles, C.B., and Andrews, J.

made between Joseph Matthews (the lessor) and Francis Turton (the lesssee), for the lives of Francis Turton (the lessee), and of Robert Turton, and John Turton, his sons, the first [being then] aged eleven and the latter aged nine years, and for sixty-one years from the death of the surviving life.

The lessor's interest passed in 1869 to the Crown.

The lessee's interest ultimately became vested in the defendant James Booth. By indenture of 20th July, 1781, Francis Turton assigned the lease of 1770 to Morgill, who on 29th September, 1789, assigned same to Power, who on 3rd March, 1790, sublet same to John Hewson, for the lives of Francis Turton, Robert Turton, and John Turton and forty-one years from the death of the surviving life. John Hewson by assignment (8th August, 1791), reciting the sub-lease of 1790, as to hold from the 29th September, 1789, for the lives of "Francis Turton and Robert Turton and John Turton, sons of said Francis Turton, who then or lately were in the East Indies, or somewhere out of the United Kingdom" assigned the premises in the sub-lease to Thomas Parsons. The interest under the lease of 1770, and this sub-lease ultimately merged in the interest of the defendant.

The original assignment of 8th August, 1791, was not forthcoming, and the evidence of its contents was obtained from the memorial thereof (produced) in the Registry of Deeds.

Notice to quit was served on the defendant on the 25th September, 1891, and a demand for possession was formally made.

It was conceded that Francis Turton and Robert Turton died prior to 1837. If John Turton was alive on the 11th November, 1837 (when he would have been seventy-six years of age, the lease would have been in subsistence at the date of the notice to quit and of the issue of the writ of summons.

Some slight evidence was given on the plaintiff's behalf at the trial of family reputation with a view to proving that John Turton must have died prior to 1837.

Mr. Justice Johnson before whom the case was tried, directed the issue-paper to be signed in blank, to be filled up, if necessary, as the Court might order, and abstained from giving judgment, leaving either party to move.

Q. B. Div. 1900.

SECRETARY FOR WAR v. BOOTH.

The *Solicitor-General* (*Wright, Q.C.*) (*Samuels, Q.C., Henry, Q.C.*, and *Vesey Fitz Gerald*, with him), for the Secretary for War, argued that the memorial of the assignment of 8th August, 1791, was receivable in evidence as being "against proprietary interest": *Price* v. *Lord Torrington* (1), *Higham* v. *Ridgeway* (2), and the cases cited in Smith's L. C., vol. ii., at p. 335; and that, so admitted in evidence, it was sufficient to found a presumption (under 7 Wm. 3, c. 8 (Ir.)) of John Turton's continued absence beyond seas, and so of his death, within seven years from its date. Further, that the evidence of family reputation offered was admissible, and, if admitted, proved that John Turton must have died prior to 1837: *Haines* v. *Guthrie* (3) as qualified by *Palmer* v. *Palmer* (4).

J. H. Campbell, Q.C., and *Jefferson*, for the defendant, contended that the memorial (even if admitted in evidence) was not evidence "*against* the defendant's proprietary interest" (under the lease of 1770), within the principles laid down in *Higham* v. *Ridgeway, etc.* (2); further, that the recital in the memorial, even if admitted, did not, as a statement of fact, support a presumption of continued absence beyond the sea for seven years before or after its date; and, lastly, that the evidence of family reputation was inadmissible: *Haines* v. *Guthrie* (3); and even if admitted, did not amount to evidence proper to be submitted to the jury.

Henry, Q.C., in reply.

Cur. adv. vult.

June 5.

PALLES, C.B.:—

This is an action of ejectment on the title for recovery of premises which were demised by a lease of the 8th of March, 1770.

At the trial, before Johnson, J., no question was left to the jury, but a verdict was taken in blank, to be filled up as the Court should direct. Thus we are the tribunal to determine all questions of fact, as well as of law.

(1) 2 Smith's L. C. (ed. 1896), 310.
(2) 10 East, 109; 2 Smith's L. C. (ed. 1896), 317.
(3) 13 Q. B. D. 818.
(4) 18 L. R. Ir. 192.

The substantial question in the case is whether the lease expired before the commencement of the action, on the 11th November, 1898. The lease was for three lives, viz. those of Francis Turton, and of his sons, Robert Turton, then aged eleven, and John Turton, then aged nine, and the longest liver of them; and sixty-one years from the death of the survivor. Thus, to entitle the plaintiff to recover, the surviving life should have died before the 11th of November, 1837.

The only question which has been argued before us for the defendant relates to John Turton, the youngest of the three lives. As he was nine years of age in 1770, he would, if alive on the 11th of November, 1837, not have been more than seventy-seven years old. From his mere age, therefore, death at or before this period cannot be presumed. The evidence of Canon Carmichael, as to the reputation of the family, is not admissible upon the question in controversy, which is not a matter of pedigree: *Haines* v. *Guthrie* (1): and indeed, even were it admissible, it would not assist the plaintiff.

The determination of the question must, therefore, turn upon the effect of the memorial registered in the Registry of Deeds Office, of the assignment of 8th August, 1791, from John Hewson to Thomas Parsons, of the sub-lease of 3rd March, 1790. By that sub-lease David Power (to whom there is evidence that the lease of the 8th of March, 1770, had been assigned), demised part of the premises in that lease to John Hewson for the three lives named in the head lease, all of which were then treated as in being, and forty-one years from the death of the survivor. There is evidence that possession accompanied this lease. It follows that any statement made by John Hewson againt his proprietary interest would, after his death, be admissible in evidence, even against persons who did not claim through him. The memorial of the assignment of the 8th of August, 1791, states the particulars of the assignment by John Hewson to Thomas Parsons, of the lease of the 3rd of March, 1790, and it is signed by John Hewson. He is described in the memorial as "one of the attorneys-at-law," and, therefore, must have been at least twenty-one years of age. Consequently,

(1) 13 Q. B. D. 818.

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had he been alive at the trial, he would have been upwards of 129 years old. The point does not appear to have been made at the trial that there was not sufficient evidence of the death of John Hewson; and had such an objection been made it probably could have been met by the production of the annual register of attorneys, which would have shown the last year for which he took out a certificate entitling him to practice. If, therefore, it had been material I should have had no difficulty in presuming that he was dead at the time of the trial.

The statements in the memorial are, therefore, those of a deceased party, and, if against his proprietary interest, would be evidence. These statements include one to the effect that the lives in the sub-lease on the 3rd March, 1790, lives which the deeds given in evidence show are the same as those in the lease of the 8th March, 1770, were "Francis Turton, late of Dublin, but then of the city of Limerick, attorney-at-law, and Robert Turton and John Turton, sons of the said Francis, *who then or lately were in the East Indies or elsewhere*, out of this kingdom." I deem it unnecessary to determine whether the statement that by this instrument John Hewson had parted with his interest in the lands is not a statement against his proprietary interest; or whether the particulars of the term for which he held is not such an integral part of that statement as to bring it within *Higham* v. *Ridgeway* (1). On these points I express no opinion; I assume in favour of the plaintiff that both questions should be answered in the affirmative; and that therefore the statement is evidence against the defendant. The next question, and that upon which, in my opinion, the determination of the case depends was, what is the statement, and what can be inferred from it? The argument for the plaintiff is that it is a statement that John Turton was, *at one time*, out of the kingdom; and, taking this as a basis, it is argued that, once a state of facts is proved, its continuance may be presumed as a fact until the contrary is shown; and that, as there is no evidence to the contrary in the present case, it should be presumed that John Turton continued to be abroad for seven years after the 8th August, 1791, and that after the expiration of such

(1) 10 East, 109.

seven years the Court is (under the statute 7 Wm. 3, c. 8 (Ireland)) bound to deal with the case as if he were then dead. Without expressing any opinion upon the validity of this argument, had it been based upon a statement that John Turton was then abroad, or even upon an unqualified statement that John Turton had been at some previous time abroad, it seems clear that it cannot prevail, unless it is based upon some statement which does not in itself negative the then present existence of the fact, the continuance of which is sought to be inferred. Now, the statement here is not that John Turton "now is abroad," but that "he either was [and] is, or at some other time has been, but is not now abroad." The statement affirms the existence of one or other of two alternative states of fact. It would be equally satisfied by the fact that John Turton had been, but was not then, abroad, as by his then being so. Now, take the second alternative, that he had been, but is not now, abroad. Such a statement cannot form any basis of a presumption of his continuance abroad, because it involves the previous cessation of his having been abroad, "he had been, but is not now, abroad." Upon this short ground, I am of opinion that the memorial does not constitute any evidence that John Turton continued to be abroad for seven years, and consequently that the statute of Wm. 3 has no application.

I feel bound to add that, in my opinion, this presumption of continuance is, in relation to a matter of this description, so slight that, even had the statement been an unequivocal one that John Turton was then abroad, I should have felt great difficulty in, from it alone, arriving at the conclusion of fact that he remained abroad "for seven years together," so as to bring the case within the statute. I confess I do not think that it was the intention of the statute that death should be presumed after the lapse of seven years from the mere circumstance that the person was proved to have been at one time abroad, without any direct evidence of his continuance abroad or of his not having since been heard of.

In my opinion, the verdict and judgment should be for the defendant.

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ANDREWS, J.:—

This was an action to recover possession of houses and premises in Ship-street, Dublin, which were alleged to have been held by the defendant as a yearly tenant whose tenancy had been determined by notice to quit. The substantial defence was that the defendant held the premises under a lease for an unexpired term. The lease in question was dated 8th March, 1770, by which the premises sought to be recovered were demised to Francis Turton for the lives of himself and his sons, Robert, and John (John being then nine years of age), and sixty-one years from the death of the last survivor. The title to the reversion was traced, and, I shall assume sufficiently, to the plaintiff, and the lessee's title was traced to the defendant. Upon the 3rd March, 1790, the then assignee of the lease sublet the premises to John Hewson for the same three lives, and forty-one years from the death of the survivor. Upon the 8th August, 1791, John Hewson assigned this sub-lease to Thomas Parsons. A memorial of this assignment was given in evidence, from which it appeared that a recital in the assignment (which was executed by John Hewson only) stated that Robert and John Turton (two of the lives in the lease of 1770) then or lately were in the East Indies, or elsewhere out of the United Kingdom.

I shall assume for the purposes of my judgment that, upon the evidence given at the trial the plaintiff is entitled to recover, if in that evidence there is anything from which it can be legitimately held that the term created by the lease of 8th March, 1770, had expired before the commencement of this action. Evidence was given of the deaths of Francis and Robert Turton (two of the lives in the lease of 1770) at dates more distant than sixty years ago. John Turton the third life, being nine years of age in 1770, would, if alive, have been only about seventy-seven years of age sixty-one years ago, and from this alone his death sixty-one years ago could not, of course, be presumed. Canon Carmichael's evidence (even if, having regard amongst other things, to the dates, he could have given any evidence of family reputation which would have been admissible as evidence of John Turton's death) is a blank as regards John Turton, of whom he never heard. It appears, however, from the Canon's evidence that Francis Turton, John's

father, was an attorney who practised in Dublin, and belonged to an old family in Limerick; and it also appears that he was buried in St. Anne's parish grave-yard in Dublin. John's original home would therefore appear to have been in Ireland, and besides his age all the rest that we know of him is that in a recital in the assignment in 1791 of the sub-lease of 1790 he is referred to as having been *then or lately in the East Indies or elsewhere out of the United Kingdom*. Now I do not think that this recital is any evidence against the defendant of the matters stated in it, and, even if it can be held to be such evidence, I do not think that either under the statute I shall refer to, or otherwise, any legitimate presumption arises or any legitimate inference can be drawn therefrom that John Turton died more than sixty-one years ago.

The Irish statute, 7 Wm. 3, c. 8 (1695), provided that in ejectments to recover land held for lives, or years determinable on lives (which is not exactly this case, but I shall assume that the statute is applicable to it), if the *cestuis que vie* shall remain beyond the seas, or elsewhere absent themselves in the realm by the space of seven years together, and no sufficient proof be made of the lives of such persons, the jury shall be directed to give their verdict as if the persons so remaining beyond the seas or absenting themselves were dead.

First, then, is the recital in question any evidence against the defendant of the matters stated in it? Even assuming that it is to be taken to have been a statement both by Hewson the assignor (whom I shall assume to be dead), and Parsons the assignee of the sub-lease, what those parties were dealing with was the assignment of a sub-lease, and I cannot regard the statement, so far as it relates to the existence of two of the lives, as being against the proprietary interest of either of the parties. On the contrary, it appears to me to have been a statement in favour of the proprietary interest of each of them. I also think that it would be quite too great a refinement to hold that the statement as to John having been abroad was against the proprietary interest of either of the parties, on the ground that if he remained absent for seven years it might become necessary in an ejectment to prove that he was living. Further, I do not think that it can be inferred that

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either of the parties to the assignment had any peculiar means, beyond mere hearsay, of knowing that John Turton then or lately was in the East Indies or elsewhere out of the United Kingdom. Granted that Parsons had an interest in making, and did make inquiry about the *cestuis que vie*, how can we infer that any information beyond hearsay, and possibly vague hearsay was obtained, or from whom the information was obtained, especially having regard to the uncertainty in the language of the recital as to where John Turton either had been, or then was? I am unable to apply the doctrines of *Higham* v. *Ridgeway* (1), or *Price* v. *Lord Torrington* (2), or any of the numerous cases on the same subjects which followed them, to the present case; and I do not think it would be safe to do so, especially where title to real property is involved. In my opinion then the recital is not evidence against the defendant.

But assuming that it is, how far does it advance the plaintiff? The statement, as regards John whose life we are dealing with, is that in 1791 he was, or lately had been, in the East Indies or elsewhere out of the United Kingdom. Consistently with that statement he might at the time have been anywhere in the United Kingdom, and there is nothing in the statement which in my opinion would warrant an inference that he was "absenting himself in the realm," within any reasonable construction of those words in the statute. The statement comes to this, and no more, that on the 8th August, 1791, or lately before that date he was in the East Indies or elsewhere out of the United Kingdom. All the rest that we know of him is that his original home would appear to have been in Ireland, and that he was in 1791 about thirty years of age. We know nothing of his profession if he had one, of his course or habit of life, or of his reason for going abroad, or as to the probability of his remaining abroad for any particular length of time. I cannot yield to the argument that, under these circumstances, we can apply the doctrine of the continuance of an existing state of things in human affairs to this case so as to found an inference that John Turton remained abroad or absented himself elsewhere in the realm for the space of seven years together, and thus bring the statutable presumption into operation.

(1) 10 East, 109. (2) 1 Salk. 285; 2 Smith's L. C. 310.

I think the doctrine of the continuance of an existing state of things in human affairs is founded on our experience of human affairs. I am not aware of any experience in human affairs justifying the assumption that *any* man who goes abroad will remain abroad any particular time. I think such an assumption in a case in which we know no more than we do in the present case would be so speculative and uncertain, and so liable to be a false assumption, as to be quite inadmissible in evidence to affect rights to property. Our common experience is that multitudes of people constantly go abroad, both on business and pleasure, and return at all kinds of intervals, far short of seven years, and I know of nothing either in the shape of authority, principle, or experience to warrant its being laid down as a matter of law, that if you merely show that a man went abroad more than seven years ago, and can show no more about him than we know about John Turton, you may, either under the statute, or outside it, presume that he remained abroad, or absented himself in or out of the United Kingdom for the space of seven years together, or that at the end of seven years he was dead. There is no affirmative evidence in this case that, assuming John Turton to have gone abroad, he did not return within seven years, or that he absented himself for the space of seven years, or that no member of his family or other person who would be likely to hear of or from him, did so for seven years after he went abroad. The result, in my opinion, is that the plaintiff upon whom the *onus* of proof lay gave no evidence either to show, or to warrant the presumption or legal inference, under the statute, or otherwise, that John Turton died more than sixty-one years ago, and, therefore, the plaintiff having failed to prove the determination of the term granted by the lease of 1770, the verdict and judgment ought, in my opinion, to be entered for the defendant.

SIR P. O'BRIEN, L.C.J.:—

I entirely agree in the result at which my brethren have arrived. The case is a short one, but it, nevertheless, involves some rather interesting points.

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The first question is whether the recitals in the memorial are evidence against the defendant. My present impression is that they are not, in any aspect, evidence against the defendant; but, assuming that they are, I do not think they involve such an admission against proprietary interest as makes them evidence against all the world, and, therefore, against the defendant in this case.

Secondly, assuming that the memorial was evidence against him, there is nothing, in my judgment, to be collected from the recitals it contains except that neither assignor nor assignee knew where John Turton was; and, assuming that there is evidence that he was in the East Indies, I do not think that the mere naked fact of his being in the East Indies at a particular time involves any presumption that he remained there. It is not tantamount to the establishment of such a state of facts as would justify the Court in presuming that he continuously resided there.

The third point is whether evidence of family reputation is admissible to prove the death of the *cestui que vie*. Canon Carmichael's testimony is quite a blank; but, even if he had been in a position to give any real evidence upon the matter, such evidence as family reputation would not be allowable to prove the dropping of a life under circumstances on which a question of pedigree did not arise, as is abundantly shown by the very authoritative case of *Haines* v. *Guthrie* (1). In *Smith* v. *Smith* (2), in the Court of Appeal in this country, Lord Chancellor Ball expresses some difficulty in explaining why the rule permitting the use of evidence of family reputation should not apply to a case such as this, turning upon the date of the death of a life; but the reason, in my judgment, is this. The admission of such evidence to prove pedigree was an exception from the general rule of our law against hearsay, and the Judges did not think fit to permit that exception to be extended beyond certain well-established exceptions. There they stopped.

(1) 13 Q. B. D. 818. (2) 1 L. R. Ir. 215.

On the application of *Samuels*, *Q.C.*, the Court directed the case to stand over till next sittings to have the question argued, "whether there is any jurisdiction to award costs against the plaintiff."

June 5.

Samuels, *Q.C.* (*Denis Henry*, *Q.C.*, and *Vesey Fitz Gerald* with him) for the Secretary for War, cited *Reg.* v. *Beadle* (1), as deciding authoritatively that the statute, 18 & 19 Vict. c. 90, ss. 1 and 2, did not apply.

Jefferson, for the defendant, relied on 18 & 19 Vict. c. 90, and cited *Moore* v. *Smith* (2), *Reg.* (*Moore*) v. *Abbott* (3), *Secretary of State for War* v. *Chubb* (4), and *In re D. W. & W. Railway Co.* (5).

PALLES, C.B.:—

It is not necessary to hear Mr. Henry. We are of opinion, that the question is not open, having regard to *Reg.* v. *Beadle* (1), which was decided in 1857. The Act 18 & 19 Vict. c. 90 is an imperial statute which binds both England and Ireland, and it is of great importance that the decisions in both countries should be uniform. *Reg.* v. *Beadle* (1), was a decision of the full Court of Queen's Bench, in which they held, as I think is quite clear, that suits within section 2 of the Act must be the same suits as are within section 1; and Lord Campbell says (p. 496)—

> "The statute 18 & 19 Vict. c. 90 does apply to the Crown. Perhaps those who framed the Act had it in contemplation to put excise prosecutions on the same footing as that on which the Legislature had already put customs prosecutions; but, if such was their intention, it has not been expressed; for, looking at sections 1 and 2, which must be read together, we find them not applicable to any cases except where the Attorney-General or Lord Advocate is a party. Now, these officers have nothing to do with informations laid by officers of excise before Justices; and, if such informations are not included, the Sessions in this case had no power to give costs, and that part of their order must be quashed."

(1) 7 E. & B. 492.
(2) 1 E. & E. 597.
(3) [1897] 2 I. R. 362, at p. 424.
(4) 43 L. T. (N. S.) 83.
(5) 31 L. R. Ir. 1.

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So too, Crompton, J., says:—

> "Section 1 uses express language, applicable to a well-known class of proceedings where the Attorney-General sues the defendant. And the nature of the enactments as to costs, both in section 1 and section 2, shows this. In both, costs are made part of the judgment. By sect. 1, where the Attorney-General has judgment, it is to be to recover the costs, and that judgment will be enforceable by execution. In sect. 2, if there is judgment against the Crown, the defendant is to have costs; but, as the judgment could not be enforced by execution against the Crown, the section proceeds to give what is equivalent to execution, by making it the duty of the Commissioners of the Treasury to pay the costs, which duty might be enforced by mandamus. So that I think it clear that both sections apply to the same kind of suits, and those only."

There has been no case since in which *Beadle's Case* (1) has been deliberately departed from. It is true that there is a decision of the Vice-Chancellor, *In re Dublin Wicklow & Wexford Railway Company* (2), which would seem to point in the contrary direction; but *Beadle's Case* (1) was not there cited in the arguments. The decision in *Moore* v. *Smith* (3), was based on section 6 of the Case Stated Act (20 & 21 Vict. c. 43). We were much pressed by *Reg.* (*Moore*) v. *Abbott* (4), but the Court of Appeal deliberately refrained from deciding the question. At page 425, it is stated—"When Jessel, M.R. granted a favour to the Crown, in *Chubb's Case* (5), it was on the terms that the liability of the Crown to pay costs should be admitted." The order made was, that the case should stand till the next sittings, and, on the second day of the next sittings, the order in the Registrar's book is one dismissing the appeal with costs by consent. If *Beadle's Case* (1) is to be questioned, it must be in another Court. We shall therefore enter judgment for the defendant without costs.

ANDREWS, MADDEN, and BOYD, JJ., concurred.

Solicitor for the plaintiff: *Sir P. Coll.*
Solicitors for the defendant: *Moore, Keily & Lloyd.*

A. E. R. J.

(1) 7 E. & B. 492.
(2) 31 L. R. Ir. 1.
(3) 1 E. & E. 597.
(4) [1897] 2 I. R. 362, at p. 424.
(5) 43 L. T. (N. S.) 83.

QUINN, Appellant; LEATHEM, Respondent. *H. L.* 1901. August 5.

Cause of action—Conspiracy—Interference with trade—Trade union—Conspiracy and Protection of Property Act, 1875, *c.* 86, *ss.* 3, 7.

Appeal from the decision of the Court of Appeal in Ireland, reported [1899] 2 I. R. 744, *sub nom. Leathem* v. *Craig*.

W. Martin M'Grath, and *Vesey Knox* (of the English bar), for the appellant.

Haldane, K.C., and *Francis Watt* (both of the English bar), for the respondent.

The House of Lords (The Earl of Halsbury, L. C., and Lords Macnaghten, Shand, Brampton, Robertson, and Lindley) affirmed the decision of the Court of Appeal (1).

Solicitor for the appellant: *Francis H. White* for *G. B. Wilkins*.
Solicitors for the respondent: *Eyre, Dowling & Co.* for *Joseph Donnelly*.

(1) [1901] A. C. 495.

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ACTION TO RECOVER POSSESSION OF LAND—*For non-payment of rent*—"*Rent*"—*Lease reserving two annual "rents" out of the same holding—Year's rent in arrear—Landlord and Tenant* (*Ireland*) *Act*, 1860, *sects*, 1, 52.] By lease dated 1879, reciting that *L.* (the lessor) had erected a dwelling-house, &c., on the premises demised, out of moneys (£896 6*s.* 6*d.*) advanced by the Board of Works, *L.* demised the lands in question for a term of sixty years to *K.*, "yielding and paying therefor and thereout the yearly rent or sum of £13 2*s.*" (over and above taxes) "and also yielding and paying as long as any sum should remain due on foot or in respect of the said loan of £896 6*s.* 6*d.*, the further yearly annual sum of £44 16*s.* 4*d.*, or such other annual sum" as might be payable in respect of same, "the said yearly rents to be payable" every 1st November and 1st May. The terminable annuity, payable to the Board of Works, was, in 1889, reduced to £35 17*s.* In 1899 the plaintiff issued a civil-bill ejectment for non-payment of rent, there being then no arrears due in respect of the Board of Works' charge, but there being due to the plaintiff a sum of £21 13*s.* 8*d.* in respect of the rent of £13 2*s.* On case stated by the Judge of Assize:—*Held*, that upon the true construction of the lease, the "rent" of the holding, within the Landlord and Tenant Act, 1860, sect. 1, was the aggregate of the two annual sums, viz. the £35 17*s.* and the £13 2*s.*; and that there not being a year's rent in arrear within sect. 52 of that Act, the plaintiff could not succeed. *Semble*, even if each sum could be regarded as a distinct rent service, sect. 52 would not enable an ejectment to be brought in respect of each such rent. *Lloyd* v. *Keys* - Q. B. 416

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APPEAL — *To Quarter Sessions — Summary jurisdiction — Recognisance to prosecute appeal — Validity of recognisance signed only by some of several appellants—Validity of recognisance signed only by an appellant's agent—Waiver*—14 & 15 *Vict. c.* 93, *s.* 24—*Effect of reversal on appeal of a joint conviction against three defendants, two of whom only had validly appealed — Bias* — Certiorari — Certiorari *in regard to an order of acquittal by an inferior tribunal.*] *D.* and two others having been jointly convicted at Petty Sessions, under the Fishery Laws, for not maintaining a free gap in the Lismore salmon weir, appealed jointly to Quarter Sessions, and, after adjournment by consent, the case was heard and the conviction below reversed. The two other appellants had duly perfected the necessary recognisances, but *D.*, owing to absence from the country, had been unable personally to sign the recognisance within the time limited by 14 & 15 Vict. c. 93, s. 24, but his agent thereto authorised had done so on his behalf. On an application for *certiorari* to quash the order of Quarter Sessions :—*Held*, that the application must fail. *Semble*, that *D.'s* recognisance was bad, but that, even if bad, this objection could not, in this case, be now taken, inasmuch as it had not been relied upon when the appeal had first come before the Quarter Sessions, and had not been relied upon

APPEAL—*continued.*
on a previous unsuccessful application to the High Court for a writ of prohibition to restrain the hearing of the appeal. *Held*, further, that, on the reversal on appeal by a Court of Quarter Sessions of a joint conviction against several defendants, the conviction as against all of them must fall, even though one of such appellants had not validly entered into the required recognisance to prosecute the appeal. *Quære*, Does *certiorari* in no case lie from an order of acquittal by Justices? *Reg.* v. *Justices of Antrim* ([1895] 2 Ir. R. 603) discussed. An objection to an adjudication by a Justice on the ground of bias must be supported by evidence to show some reasonable likelihood of bias. *Reg.* (*Drohan*) v. *Chairman and Justices of County Waterford* Q. B. 548
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ARRANGING DEBTOR—*Bankruptcy—Vesting property in the Official Assignees for the purpose of an arrangement—Proposal to pay interest on debts and premiums on policies of insurance on his life—Proposal, whether reasonable and proper.*] An arranging debtor was, at the date of presenting his petition, entitled to household furniture worth £1000, and he had a life interest in a landed estate, producing a net rental of £2000 a-year, which was mortgaged for its full value; he had also policies of insurance on his own life for £163,120, the surrender value of which was £12,697. The debts were—fully secured creditors, £111,100, partially secured after deducting the value of the securities, £26,299, and unsecured, £7234; making the total liabilities, exclusive of fully secured creditors, of £33,533. The debtor's proposal was to pay or provide annually such sum as might be required to pay the annual interest, at the rate of 4 per cent. per annum, upon all the unsecured debts, and upon so much of the partially secured debts as might be proved or admitted for dividend against his estate, and to continue to pay interest on the debts until the debts should be paid out of the policies; also to pay the premium on the policies, and to charge his equity of redemption in the policies with the payment of the said debts, interest, and premiums. For the purpose of effecting this arrangement, the petitioner undertook to vest by deed in a trustee his interest in the policies, by way of security for the ultimate payment of the debts and interest out of the policies; the deed was to contain a covenant by the debtor for payment of interest on the debts, and for the up-keep of the policies, and, in case of default by the debtor in making these payments, the creditors were to be remitted to their original rights. Boyd, J., being of opinion that the proposal was not reasonable or proper unless the equity of redemption in the policies was vested in the official assignees, made no rule on the first sitting:—*Held* (reversing the decision of Boyd, J.), that the omission to vest the equity of redemption in the policies in the official assignees was not of itself sufficient to render the proposal unreasonable and improper. *In re M., an Arranging Debtor* [APP. 51

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See BYE-LAWS.

BYE-LAWS—*Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *sects.* 40, 41—*Reasonableness—Buildings of a temporary character.*] The defendants were prosecuted under the Public Health (Ireland) Act, 1878, sects. 40 and 41, and the Dublin city bye-laws framed thereunder—(*a*) for erecting a new building of wood within the Urban Sanitary District without giving the required notice to the complainants; (*b*) for erecting a building not enclosed by walls of incombustible material; and (*c*) for erecting a building projecting beyond the front of the buildings on either side of it in the street without the required consent. The building in question was a removable structure (65 feet by 21 feet), with a canvas roof, composed entirely of wood, made up in sections, which could be put together or taken down in a few days. It "was intended for, and actually used as, a temporary structure at" the place in question, and was erected for use there only for a few months for the purpose of religious meetings. On a case stated for the opinion of the Queen's Bench Division:—*Held* (by Lord O'Brien, L.C.J., and Boyd, J., Barton, J., *diss.*), that the Public Health Act, 1878, and the Dublin bye-laws framed thereunder, contemplated buildings of a permanent character, not temporary structures such as the premises in question. *Lord Mayor, Aldermen and Burgesses of Dublin, Appellants; Irish Church Missions, Johnston and Mumford, Respondents* - Q. B. 387

CARRIERS—*Contract—Liability limited to wilful misconduct—Acts of omission—Knowledge—*Onus *of proof.*] *G.*, having contracted with the Railway Company that they were to be exonerated from liability in respect of the transit of his goods, save when the damage arose from their wilful misconduct, delivered at Ballymena railway station, for carriage to Manchester, a case of fowl which the Railway Company knew to be perishable goods requiring to be forwarded without delay. They failed to despatch the goods by either of two trains, which would have ensured their arrival in time for the Manchester markets on the following morning, for which they were intended, and when the goods did arrive in Manchester they were late, and being perishable, had deteriorated in value. At *G.'s* instance, the consignee refused to take delivery, and *G.* sued the Company for the loss occasioned by their wilful misconduct in delaying the goods:—*Held* (Palles, C.B., *diss.*), that, under the circumstances, unreasonable delay, even though entirely unexplained, was not sufficient to amount to wilful misconduct, and that it lay upon the plaintiff to prove that the defendants intentionally delayed the goods. *Held*, by Palles, C.B., that the defendants being aware, from the perishable nature of the goods, that substantial damage would result from delay, there was evidence that their omission to forward them at once was wilful, and therefore there was evidence of wilful misconduct. *Graham* v. *Belfast and Northern Counties Railway Co.* [Q.B. 13

CASE STATED—Evidence—Trespass in pursuit of game—Divisional Court—Jurisdiction
See TRESPASS IN PURSUIT OF GAME. [423

CASES—*Bradley* v. *Archibald* ([1899] 2 I. R. 108) distinguished - - - 7
See DETINUE.

—— *Brown* v. *Sewell* (11 Ha. 49) distinguished and explained - - - - 513
See MORTGAGE. 2.

—— *Fahey* v. *Frawley* (26 L. R. Ir. 78) applied by Kenny, J. - - - - 269
See MONEY PAID.

—— *Kennedy* v. *Hilliard* (10 Ir. C. L. R. 195) followed - - - - - 115
See LIBEL. 2.

—— *M'Kenna* v. *Harnett* (13 Ir. L. R. 206) applied by Gibson, J. - - - 269
See MONEY PAID.

—— *Reg.* v. *Justices of Antrim* ([1895] 2 I. R. 603) discussed - - - - 548
See APPEAL.

—— *Ruttledge's Estate, In re* ([1895] 1 I. R. 328), followed - - - - 445
See TITHE RENTCHARGE.

—— *Scovell* v. *Gardiner* (16 Ir. C. L. R. 318) principle of, followed - - - 433
See POOR RATE.

—— *Wood* v. *Walshe* ([1899] 1 Q. B. 1009) dissented from - - - - 328
See WORKMAN. 2.

CATALOGUE — Sale of bicycle — Guarantee
See GUARANTEE. [189, 615

CAUSE OF ACTION—Malicious interference with contracts - - - - 705
See CONSPIRACY.

CAVEAT—Probate action—Costs - 645
See COSTS. 2.

CERTIFICATE—Good character—Applicant for spirit grocer's license - 133, 162
See LICENSING ACTS. 2.

—— Notice—Excise license—Next resident magistrate - - - - - 497, 502
See LICENSING ACTS. 5.

CERTIORARI — Reversal of conviction by Quarter Sessions—Appeal—Recognisance
See APPEAL. [548

CESS COLLECTOR — *Local Government (Ireland) Act*, 1898—"*Existing officer*"—*Deputy cess-collector—Joint deputy cess-collectors—Scheme for collection of poor-rate — "Approval" of Local Government Board.*] An appointment on 21st March, 1898, by a baronial high constable (himself appointed at the Spring Assizes, 1898) of a person as his deputy to collect the county cess struck by the Grand Jury at the previous Summer Assizes, and who was not re-appointed at the Spring Assizes, 1899, is not sufficient to give to such deputy the status of an "existing officer" within sect. 115 of the Local Government Act, 1898, or to entitle him to compensation for loss of office. The position of joint deputy cess-collectors discussed. *Semble*, the "approval" of the Local Government Board of a "scheme" (under s. 115 of the Act) for the collection of poor-rate should be given by a formal document executed pursuant to sect. 102. *Semble*, a county official who claims and accepts compensation for loss of office is not "an existing officer willing to serve," and his election to accept compensation cannot be subsequently withdrawn. *Reg.* (*Deane*) v. *Cork County Council* [Q. B. 367

CITATION—Costs - - - - 645
See COSTS. 2.

CIVIL BILL—Overholding—Transfer to High Court - - - - 628, 632
See OVERHOLDING.

CLAIM FOR COMPENSATION—Workmen's Compensation Act, 1897—Death of sole dependent - - - - 633
See WORKMAN. 1.

CLOG—On equity of redemption - 653, 671
See MORTGAGE. 1.

COLLATERAL AGREEMENT — Mortgage
See MORTGAGE. 1. [653, 671

COMMISSIONER OF VALUATION.
See VALUATION ACTS.

COMMON INFORMER — Disqualification of District Councillor—Penalty - 39
See PENALTY.

—— Sale of Poisons Act, 1870, s. 2 - 589
See POISON.

COMPANY—Liability—Sale of unlabelled poison
See POISON. [589

—— Railway.
See RAILWAY COMPANY.

COMPENSATION — Loss of office — Deputy cess collector - - - - 367
See CESS COLLECTOR.

—— Loss of office—Solicitor occasionally acting for Township Commissioners - 28
See SOLICITOR.

—— Malicious injury criminal in character—County Court Jurisdiction 255, 261
See MALICIOUS INJURY. 2.

COMPENSATION—*continued.*

—— Malicious injury — Recorder of Belfast—Jurisdiction - - - - 1
See MALICIOUS INJURY. 1.

—— Workmen's Compensation Act, 1897 [241, 328, 633
See WORKMAN. 1–3.

CONDITIONS—Railway Company—Wilful misconduct—Onus of proof - - 13
See CARRIERS.

CONSPIRACY — *Cause of action — Interference with trade—Trade Union—Conspiracy and Protection of Property Act*, 1875, *ss.* 3, 7.] Decision of the Court of Appeal [1899] 2 I. R. 744, *sub nom. Leathem* v. *Craig*, affirmed by the House of Lords. *Quinn, Appellant; Leathem, Respondent* [H. L. 705

CONTRACTOR—Maintenance of roads—Local Government—Tender - - 355
See ROADS.

CONVERSION—Real estate—Foreign domicil—Will—Probate - - - 232
See DOMICIL.

COSTS—*Immunity of the Crown*—18 & 19 *Vict.* c. 90, *ss.* 1, 2.] *Held*, that no order could be made for costs against the Secretary of State for War. *Re Beadle* (7 Ell. & Bl. 92) followed. *Secretary of State for War* v. *Booth* - - Q. B. 692

2. —— *Probate suit—Costs "in the action"—Counterclaim—Caveat—Citations—Subpœna, insertions of names in, after sealing of—Witnesses, expenses of—Attendance of country solicitor in Dublin.*] An action having been brought by an executor propounding a will of 1897, the defendant put in a defence, which was substantially a counterclaim, propounding a will of 1894. The plaintiff pleaded, by way of reply, the revocation of the will of 1894 by the will of 1897 and two intermediate wills. At the trial the will of 1897 was established, and an order made giving plaintiff and defendant their costs properly incurred in the action out of the assets. On a motion to review the taxation of the defendant's costs, it was objected that the taxing-master should not have allowed the defendant the costs of the counterclaim, on the ground that they were not costs "in the action." No such objection was taken before the taxing-master:—*Held* (1), that this objection could not now be relied on; and (2) that, even if it could, the costs of the counterclaim were costs "in the action." The costs of a caveat and appearance to the warning, though incurred before writ issued, are "costs in the Probate action." The costs of citations to legatees may be allowed in a proper case, although the executors of the will under which the legatees claim are before the Court. Additional names should not be inserted, as of course, in a writ of subpœna once it has

COSTS—*continued.*
been issued and sealed. If it is desired to insert additional names, a corrected præcipe should be lodged, and the writ resealed. The mere fact that a witness has not been subpœnaed is no ground for disallowing his expenses or the costs of attending on him to take his evidence. If the country solicitor of a party, or his assistant, is a necessary witness at the trial in Dublin, the mere fact that the solicitor has a registered address in Dublin is not a sufficient ground for disallowing their travelling expenses and the solicitor's fee for attendance as a witness. A witness coming to Dublin by rail should only be allowed the actual fare paid, although it is less than the ordinary fare, as where he travels by an excursion train. *Craig* v. *Boyd* - - Q. B. (PROB.) 645

3. —— *Writ of summons—Irregularity—Writ indorsed with claim in contract for less than* £20 *(both parties residing within the same civil-bill jurisdiction), and* £1 5*s. for costs—R. S. C.* (1891) *Ord. III., Rule* 7; *Order LXV., Rr.* 3, 4, 7.] It is not an irregularity in a writ of summons claiming in contract a sum less than £20 to add a claim for half costs (£1 5*s.*), even where the parties reside within the same civil-bill jurisdiction. *Haig & Haig* v. *MacMahon* - - Q. B. 350

—— Detinue—Return of property before pleadings—Offer to pay all costs up to that date—Subsequent costs - - 7
See DETINUE.

—— Security for—Action for penalties—Acting as councillor while disqualified - 640
See SECURITY FOR COSTS. 1.

—— Security for—Action on foreign judgment—Satisfactory affidavit as to defence
See SECURITY FOR COSTS. 2. [337, 344

—— Security for — Step in action — Resisting motion for judgment - - 267
See SECURITY FOR COSTS. 3.

COUNTERCLAIM—Probate Suit—Costs "in the action" - - - - 645
See COSTS. 2.

COUNTY COUNCIL.
See LOCAL GOVERNMENT.

COUNTY COURT—Jurisdiction—Criminal injury—Local Government Act, 1898, s. 5.
See MALICIOUS INJURY. 2. [255, 261

—— Overholding—Transfer of civil bill to High Court - - - - 628, 632
See OVERHOLDING.

CRIMINAL INJURY—Compensation—Jurisdiction, County Court—Local Government Act, 1898, s. 5 - - 255, 261
See MALICIOUS INJURY. 2.

CRIMINAL INJURY—*continued.*
—— Compensation — Jurisdiction, Recorder of Belfast—Local Government Act, 1898, ss. 5, 21—Belfast Borough Act, 1868, s. 18 - - - - - - 1
See MALICIOUS INJURY. 1.

CRIMINAL LAW—Acquittal — Quarter Sessions—Certiorari - - - 548
See APPEAL.

—— Charge amounting to criminal offence — Sureties for good behaviour—Rebutting evidence - - - - - 593
See SURETIES FOR GOOD BEHAVIOUR.

—— Seditious Libel—Pleading - - 569
See SEDITION.

CROWN—Proceedings on behalf of—Costs 692
See COSTS. 1.

DAMAGE—Not exceeding £5 - - 1
See MALICIOUS INJURY. 1.

—— Title deeds — Equitable mortgage unredeemed - - - - - 513
See MORTGAGE. 2.

DEATH—Of sole dependent on workman before claim for compensation - - 633
See WORKMAN. 1.

—— Presumption of — Lease for lives—7 Wm. 3, c. 8 (Ir.) - - - - 692
See LEASE.

DEBTOR'S SUMMONS—*Act of Bankruptcy—Adjudication—Subsequent payment of petitioning creditor's debt—Application to annul bankruptcy—Right of other creditors.*] Where a person was adjudicated a bankrupt on the non-payment of a debtor's summons, and after the adjudication the amount was paid by a third person, who took an assignment of the debt, the Court declined to allow an application by the bankrupt to have the bankruptcy annulled, on the ground that there were other creditors besides the petitioning creditor, and that, in the absence of any consent on their part, the adjudication enured for their benefit. *In re Daniel, a bankrupt* - Q. B. (BANKCY.), 186

DEFAMATION.
See LIBEL.

DEFENCE—Of action by insurers—Negligence—Arbitration - - - - 262
See ARBITRATION.

—— Satisfactory affidavit as to—Action on foreign judgment - - - - 337, 344
See SECURITY FOR COSTS. 2.

DELAY — Unreasonable—Railway Company—Onus of proof - - - - 13
See CARRIERS.

DEPENDENT — On workman — Death before claim for compensation - - 630
See WORKMAN. 1.

DEPUTY—Cess collector—"Existing officer"
See CESS COLLECTOR. [367

DETINUE—*Practice—Costs—Return of property after service of writ, and before statement of claim—Offer by defendant to pay all costs properly and necessarily incurred up to date of return of property—Subsequent costs—R. S. C. Ir.* (1893), *Order LXV., Rule* 4.] In an action for the return of two receipts or their value, and for damages for their detention, the defendant returned the documents after the service of the writ, and before the delivery of the statement of claim, and offered to pay to the plaintiff the costs properly and necessarily incurred up to the date of the return of the documents. The plaintiff furnished his costs, and the defendant objected to the amount, inasmuch as the bill included the costs of a statement of claim not then delivered. The plaintiff subsequently delivered a statement of claim claiming damages for the detention, and the defendant delivered a defence, lodging £1 in Court in satisfaction of the plaintiff's claim, which the plaintiff accepted in satisfaction of the damages for detention. The parties resided within the same civil-bill jurisdiction:—*Held* (reversing the decision of Boyd, J., sitting to hear applications for the Queen's Bench Division), that the plaintiff was not entitled to any costs incurred after the return of the documents. *Bradley* v. *Archibald* ([1899] 2 I. R. 108) distinguished. *Donnelly* v. *Coyne* - - - APP. 7

DISQUALIFICATION—District Councillor—Action for penalties — Security for costs - - - - - - 640
See SECURITY FOR COSTS. 1.

—— District Councillor—Penalty—Prosecutor 39
See PENALTY.

DISTRICT COUNCILLOR — Action for penalties—Security for costs - 640
See SECURITY FOR COSTS. 1.

—— Disqualification—Prosecutor - - 39
See PENALTY.

DOMICIL—*Probate—Power of appointment—Will made in execution of power—Limited grant.*] By marriage settlement, made in 1853, real estate in Ireland and certain moneys were vested in trustees by the intended husband upon trust to sell the real estate, and to hold the proceeds of sale and the moneys upon trust (in the events, which happened, of there being no child of the marriage, and of the husband dying in the lifetime of his wife), for such person or persons, for such estates or interests, and in such manner as he should by deed, or by his last will and testament, in writing, appoint. The husband died in 1865, having made his will in Scotland in 1862, by which he gave all the rest of his property to his wife for life, and appointed her residuary legatee. In 1866 probate of the will, in common form, was granted to *A*, who had been appointed executor and trustee. In 1897 the wife died, having made

DOMICIL—*continued.*
a will appointing *B* executor and residuary legatee. The husband was a domiciled Scotchman. His will was duly executed according to the Wills Act, 1837, but invalid according to Scotch law. The real estate remained unsold. An action having been brought to revoke the probate of the will of the husband, the Court *held*:—1. That the real estate was, notwithstanding the trust for conversion, to be regarded as land; and that, the will being valid according to the law of England, the residuary gift was a good appointment of the beneficial interest in the lands to the wife. 2. That the residuary gift was also a good appointment of the trust moneys, inasmuch as the intention of the settlement was that the trust funds were to be disposed of by a will made according to the law of England. That the probate in common form should be revoked, and liberty given to *B* to apply for a grant limited to the real estate and trust moneys, the subject-matter of the power of appointment. *Murray* v. *Champernowne*
[Q. B. (PROB.) 232

—— English—Assets in Ireland—Probate 489
See PROBATE.

EJECTMENT.
See ACTION TO RECOVER POSSESSION OF LAND.

EQUITABLE MORTGAGE—Title deeds—Injury to—Damages pending redemption
See MORTGAGE. 2. [513

EQUITY OF REDEMPTION—Clog
See MORTGAGE. 1. [653, 671

ESTATE DUTY—*Revenue—Finance Act*, 1894, *ss.* 1, 2, *sub-s.* (d); *s.* 7, *sub-s.* 5—*Estate duty—Agricultural property—Principal value—Land in the occupation of a tenant—Policies of insurance—No part of the premiums paid by the deceased—Property passing at the death.*] In estimating, for the purpose of Estate Duty, the principal value of agricultural land in the occupation of a tenant, where no part of such principal value is due to the expectation of an increased income, the proviso to section 7, sub-section 5, of the Finance Act, 1894, applies, and the tenant is entitled to have the principal value limited, as therein provided, to "25 times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed under that assessment, and are allowed under the Succession Duty Act, 1853, and, making a deduction for expenses of management, not exceeding 5 per cent. of the annual value so assessed." *R.*, upon the occasion of his marriage in 1843, assigned four policies of insurance, and his wife assigned a sum of £3500, to trustees. Under the provisions of the settlement the policies were kept up, and the annual premiums paid, exclusively out of the

ESTATE DUTY—*continued.*
income of the moneys of the wife, until the death of *R.* in 1898, when the moneys secured by the policies became payable:—*Held*, that the moneys payable under the policies were liable to Estate Duty under section 2, sub-section (*d*), of the Finance Act, as being an "interest purchased or provided by the deceased, either by himself alone, or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased," and therefore property "deemed to pass" within the meaning of the section. *Attorney-General* v. *Robinson* Q. B. 67

2. —— *Settled property—Finance Act*, 1894, *sect. 5, sub-sect.* 2.] Decision of the Court of Appeal, [1900] 2 I. R. 400, affirmed. *Commissioners of Inland Revenue, Appellants; Priestley, Respondent*, - - - - - - - H. L. 386

ESTOPPEL—By conduct - 215, 224, 278, 305
See TRUCK ACT.
VALUATION ACTS.

EVIDENCE—Bias—Justices - - 548
See APPEAL.

—— Burden of proof — Wilful misconduct — Railway Company — Unreasonable delay
See CARRIERS. [13

—— Jurisdiction of Justices to receive—Application for spirit grocer's licence—Character of applicant—Police not opposing
See LICENSING ACTS. 2. [133, 162

—— Presumption—*Contra spoliatorem* 189, 615
See GUARANTEE.

—— Presumption — Death of *cestui que vie*—7 Wm. 3, c. 8 (Ir.) - - - 692
See LEASE.

—— Sureties for good behaviour — Rebutting complaint - - - - 593
See SURETIES FOR GOOD BEHAVIOUR.

—— Trespass in pursuit of game — Summary procedure - - - - 423
See TRESPASS IN PURSUIT OF GAME.

FAIR RENT — Fee-farm grant — Tithe Rentcharge - - - - - 445
See TITHE RENTCHARGE.

FEE-FARM GRANT — Tithe rentcharge — Incidence of—Fair rent - - 445
See TITHE RENTCHARGE.

FITNESS—Implied guarantee — Sale of bicycle
See GUARANTEE. [189, 615

FOREIGN DOMICIL—Irish assets—Probate—
See PROBATE [489

—— Will exercising power—Probate - 232
See DOMICIL.

FOREIGN JUDGMENT—Action on—Security for costs - - - 337, 344
See SECURITY FOR COSTS. 2.

FRANCHISE.
See PARLIAMENT.

GAME—Trespass in pursuit of - - 423
See TRESPASS IN PURSUIT OF GAME.

GAMING — Game of skill played for money—Licensed premises—35 & 36 Vict., c. 94, s. 17 - - - - - - 429
See LICENSING ACTS. 3.

GRAND JURY — Deputy cess collector — "Existing officer" - - - 367
See CESS COLLECTOR.

GUARANTEE—*Sale of goods — Contract — Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14—*Guarantee — Implied guarantee of fitness and of quality of materials and workmanship — Sale of specified article by its trade name — Negligence — Evidence*—Omnia præsumuntur contra spoliatorem —*Bicycle.*] The plaintiff purchased an 1896 Royal Rover from *G.*, an agent of defendants in Belfast. The machine was described in the Company's catalogue (which the plaintiff read before purchasing), and was in accordance with the description in it. The catalogue contained an express guarantee excluding the guarantee implied by statute or otherwise as to quality of fitness, and guaranteeing that all precautions usual and reasonable had been taken to secure excellence of material and workmanship, and undertaking to make good at any time within a year any defects in these respects. The plaintiff used the machine constantly for over seven months in Belfast, when he took it to pieces and packed it up. The plaintiff then went to England, and after four months he had the bicycle sent over to him at Leeds, where he rode it constantly for two months, when, while riding it at a good pace along a good road for cycling, the steering-post of the machine broke just below the crown plate, the front wheel became detached, and the plaintiff was thrown and injured. After the accident the plaintiff had the machine examined by three persons, who all stated that the break was a clean one—not the result of a flaw, or defective materials of workmanship. The plaintiff sent the broken machine to the defendants "for inspection," when the defendants replaced the broken parts, and threw them away. In an action for breach of contract in the sale of the bicycle, the plaintiff obtained a verdict for £120. On motion by the defendants to set aside the verdict and to enter judgment for them, the Queen's Bench Division (Palles, C.B., *diss.*) gave judgment for the defendants. On appeal:—*Held* (affirming the decision of the Queen's Bench Division), (1) that the mere happening of the accident, and the fracture and appearance of the tube, were not evidence of the breach of the catalogue guarantee; and (2) (agreeing with the majority of the Queen's Bench) that as three of the plaintiff's witnesses

GUARANTEE—*continued.*
had seen the broken pieces of the machine, the loss and non-production of these broken pieces did not make the defendants *spoliatores*, or shift upon them the burden of proof. *Williamson* v. *Rover Cycle Company* - - Q. B. 189 ; App. 615
—— Contraction for maintenance works — Tender *See* Roads. [355

IMPLICATION—Guarantee—Sale of goods *See* Guarantee. [189, 615

INDORSEMENT — Writ of Summons — Excessive claim for costs - - 350 *See* Costs. 3.

INFIRMARY—County—Surgeon of - 93 *See* Quo Warranto.

INFORMATION—Seditious libel - 569 *See* Sedition.

INHABITANT HOUSEHOLDER — Rates—Payment—Tender - - - 490 *See* Parliament.

INNUENDO—Pleading—Libel - 465, 479 *See* Libel. 1.

INSURANCE.
See Policy of Insurance.

INTERIM TRANSFER—License — Assignee of transferee - - - - 352 *See* Licensing Acts. 4.

IRREGULARITY — Registration of Chancery order as a judgment—Privilege - 115 *See* Libel. 2.
—— Writ of summons—Indorsement—Excessive claim for costs - - - 350 *See* Costs. 3.

JUDGMENT — Foreign — Jurisdiction — Action upon—Affidavit of good defence 337, 344 *See* Security for Costs. 2.
—— Motion for — Affidavit to resist — Step in action - - - - - - 267 *See* Security for Costs. 3.
—— Registration —Chancery order — Irregularity *See* Libel. 2. [115

JURISDICTION—County Court—Criminal injury - - - - - 255, 261 *See* Malicious Injury. 2.
—— Divisional Court—Case stated by Justices *See* Trespass in Pursuit of Game. [423
—— Foreign judgment - - - 337, 344 *See* Security for Costs. 2.
—— Justices—Certificate for spirit grocer's license —Absence of objection by police—Evidence as to character of applicant *See* Licensing Acts. 2. [133, 162
—— Justices—Disqualification of Urban District Councillor—Penalty - - 39 *See* Penalty.

JURISDICTION—*continued.*
—— King's Bench Division, Probate — English domicil of testator—Assets in Ireland *See* Probate. [489
—— Recorder of Belfast—Compensation for malicious injury - - - - - 1 *See* Malicious Injury. 1.

JUSTICES — Appeal — Notice — 35 & 36 Vict. c. 94, s. 52 - - - - - 130 *See* Licensing Acts. 1.
—— Appeal—Recognisance—Order of acquittal—Certiorari - - - - - 548 *See* Appeal.
—— Case stated—Jurisdiction of Divisional Court *See* Trespass in Pursuit of Game. [423
—— Notice of application for excise license — Service—Next resident magistrate *See* Licensing Acts. 5. [497, 502
—— Prosecution for acting as District Councillor when disqualified—Prosecutor—Common informer—Penalty—Appropriation 39 *See* Penalty.
—— Sale of Poisons Act, 1870—Company—Common informer - - - 589 *See* Poison.
—— Spirit grocer—Application for certificate — Absence of objection by police 133, 162 *See* Licensing Acts. 2.
—— Sureties for good behaviour — Evidence — Rebutting complaint - - 593 *See* Sureties for Good Behaviour.
—— Trespass in pursuit of game—Evidence 423 *See* Trespass in Pursuit of Game.

JUSTIFICATION—Plea of—Seditious libel—6 & 7 Vict. c. 96, s. 6 - - 569 *See* Sedition.

LAND LAW (IRELAND) ACTS—Subdivision —Present tenancy vested in tenants in common—Mortgage of a share - 61 *See* Subdivision.

LANDLORD AND TENANT—Estate duty—Agricultural land in occupation of tenant *See* Estate Duty. 1. [67
—— Land Law (Ireland) Acts. *See* Land Law (Ireland) Acts.
—— Lease. *See* Lease.
—— Overholding — Civil bill for — Transfer to High Court - - - 628, 632 *See* Overholding.
—— Poor rate—Agreement by landlord to pay—Agreement made before "appointed day" for reversionary lease - 433 *See* Poor Rate.
—— Redemption of rent—Fee-farm grant—Fair rent—Tithe rentcharge - 445 *See* Tithe Rentcharge.

LEASE—*For lives and term of years thereafter—Presumption of death of* cestui que vie—7 *Wm.* 3, *c.* 8 (*Ir.*)—*Evidence.*] The defendant held certain premises, under a lease made in 1770, for three lives (*A*, *B*, and *C*), and for sixty-one years thereafter. *A* and *B* died prior to 1837. *C* was, in 1770, aged nine years. The Secretary of State for War, as assignee of the lessor, served, in 1891, a notice to quit upon the defendant, and, on the 11th November, 1898, brought the present action of ejectment, founded on such notice. If *C* was alive in 1837 (when he would have been seventy-six years of age) the lease would have been in subsistence at the date of the notice to quit. The plaintiff produced (*a*) some slight evidence of family reputation as to *C's* death, and (*b*) a recital in a "memorial" (lodged in the Registry of Deeds office), of an assignment (in 1791) of a sub-lease of the same premises, setting forth that the original lease of 1770 was for the lives of *A* (then deceased) and his sons *B* and *C*, "who then or lately were in the East Indies, or elsewhere out of this kingdom." On motion for judgment, pursuant to leave reserved at the trial:—*Held*, that, this not being a case of pedigree, the evidence as to family reputation was inadmissible; that, even if the statement in the memorial were admissible in evidence as being against proprietary interest, it was not sufficient within 7 Wm. 3, c. 8 (Ir.), to ground the statutory presumption that *C*, "having remained beyond the seas, or absented himself in the realm, for seven years, . . ." had ceased to exist; and that, accordingly, judgment should be entered for the defendant. *Secretary of State for War* v. *Booth* - - - - - - - Q. B. 692

—— Reservation of two rents — Ejectment for non-payment of rent - - 416
See ACTION TO RECOVER POSSESSION OF LAND.

—— Reversionary—Agreement for, made before "appointed day"—Poor rate - 433
See POOR RATE.

LIABILITY OF EMPLOYER—*Negligence—Master and servant—Course of employment.*] Two servants of the defendant tramway company took two horses out of the defendants' stables to ride them to a neighbouring forge to be shod, and raced the horses furiously along the public road, vying who should get there first. The plaintiff's horse took fright, and the plaintiff was thrown out of her trap and injured. On new trial motion:—*Held*, that the defendants were liable for the negligence of their servants, inasmuch as—the first and main purpose of the servants being in the ordinary course of their employment, and for their employers' benefit—the existence of a secondary object—the servants' own amusement—did not exonerate their employers. *Gracey* v. *Belfast Tramway Company* [Q. B. 322

LIBEL — *Defamation — Pleading — Innuendo—Finding of jury against innuendo but that words were a libel.*] A plaintiff in an action of libel set out the words complained of in his statement of claim and imputed an actionable meaning to them by an innuendo, but did not aver that they were libellous *per se*. The defendant pleaded that the words were no libel, traversed the innuendo, and pleaded privilege and fair comment. The jury found against the innuendo, but found that the words were a libel, that they were not fair comment, and that the defendants had acted maliciously, awarding £50 damages. The Judge at the trial thereupon entered the verdict and judgment for the plaintiff:—*Held* by the Court of Appeal (reversing the decision of the Queen's Bench Division), that the course taken by the learned Judge at the trial was right, and that the plaintiff was entitled to the verdict and judgment. *Fisher* v. *Nation Newspaper Company, Limited, and Rooney* [Q. B. 465; APP. 479

2. —— *Privilege—Acts done in the course of justice—Irregular registration of a Chancery order as a judgment—Action "pending."*] *A* sued *B* for damages in the Vice-Chancellor's Court; and, at the hearing, upon a consent being entered into between the parties, the Court ordered the consent to be received, and that all further proceedings in the action should be "stayed on the terms therein mentioned," viz. that *B* should pay to *A* the sum of £327 forthwith, and costs of suit when taxed and ascertained; that on payment of said sums all further proceedings be stayed, and that in default, *A* should be at liberty to issue execution. *B* paid the £327, but the costs being still due but untaxed, *A's* solicitor treating this order as a "judgment," applied for an office copy of same, caused it to be entered in the Records and Writs Office as a judgment, obtained the certificate or memorandum of the officer of that department, and thereupon caused the order to be registered as a judgment against the defendant in the Judgments Registry Office. The Vice-Chancellor having set aside the entry, in the Records and Writs Office, of the order, as a judgment, and its registration, as irregular, *B* sued *A* for libel. On new trial motion:—*Held*, that the publications complained of, viz. the handing of the draft memorandum to the officer of the Records and Writs Office for authentication by him, and the handing of the same document so authenticated, to the Registrar of Judgments for registration—were privileged, as being steps taken, however irregularly, in the course of judicial proceedings; and *held*, further, that the fact of "further proceedings being stayed" did not affect the defendant's privilege. *Kennedy* v. *Hilliard* (10 Ir. C. L. R. 195) followed. *Mac Cabe* v. *Joyst* - - - - - - Q. B. 115

LIBEL—*continued.*
—— Seditious—Information—Pleading 699
See SEDITION.

LICENSING ACTS—*Appeal to Quarter Sessions*—35 & 36 *Vict. c.* 94, *sect.* 52—*Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52) *sect.* 269]. The 52nd section of the Licensing Act, 1872, is an independent appeal procedure, complete in itself. Section 24 of the Petty Sessions (Ireland) Act, 1851, does not apply to such appeals. So also in appeals under the Public Health (Ireland) Act, 1878, a complete procedure is provided by section 269. *Reg.* (*Magrath*) v. *Chairman and Justices of Co. Wicklow* - - - - Q. B. 130

2. —— *Application for certificate for spirit grocer's licence—Absence of objection by police—Evidence taken by magistrates as to the unfitness of the applicant—Refusal to grant a certificate as to the good character of the applicant*—Mandamus—*Effective alternative remedy by appeal*—Certiorari.] *M.* applied to the magistrates at Petty Sessions for a certificate as to his good character and the suitability of his premises, to enable him to obtain a spirit grocer's licence. There was no objection by the police to the application. Two of the presiding magistrates retired from the Bench, and gave evidence of intoxication on the part of *M.* Acting on this evidence, and also on the evidence of another magistrate who happened to be in Court, though not on the Bench, the remaining presiding magistrates refused to grant the applicant a certificate of good character. The applicant's solicitor at Petty Sessions objected that it was not competent for magistrates to give up their positions on the Bench and become witnesses, but raised no point as to the absence of objection by the police. The applicant having moved the Queen's Bench Division for *mandamus* and *certiorari*, to compel the magistrates to grant him the certificate:—*Held* by Sir P. O'Brien, L.C.J., and Gibson, J., that there was no jurisdiction given by the Licensing Acts to the magistrates enabling them to refuse a certificate of good character to an applicant seeking a spirit grocer's licence, except in cases where the police make an objection to the issue of such certificate; but that the applicant was not entitled to *mandamus*, because he had another effective remedy, viz. by appeal to Quarter Sessions. *Held*, by Murphy and Madden, JJ., that a writ of *mandamus* ought not to issue to compel magistrates to give a certificate of personal character which they knew to be false. *Held*, by the majority of the Court of Appeal, Walker and Holmes, L.JJ. (FitzGibbon, L.J., *dissentiente*), that in the absence of an objection by the police the magistrates had no jurisdiction to refuse the applicant a certificate as to his good character; that no appeal lay from the decision of the magistrates to Quarter Sessions, and that accordingly the writ of *mandamus* should

LICENSING ACTS—*continued.*
issue. *Semble* (*per* Walker, L.J.), that in cases where magistrates act without jurisdiction, or in excess of jurisdiction, even though a right of appeal may exist, *mandamus* may be granted as a more appropriate and effective remedy. *Per* FitzGibbon, L.J., that the magistrates were not bound to give a certificate of good character, which they knew would be false, to the applicant, in the absence of objection by the police; that an appeal lay to Quarter Sessions, and afforded an adequate and effective remedy; that if the magistrates were directed to rehear the case, an objection would at once be made by the police, as would have been done at the first hearing had the point now raised been suggested by the appellant, and thus the remedy by *mandamus* would become abortive; and that for all these reasons the writ should not issue. *Reg.* (*M'Kenney*) v. *Justices of Co. Antrim*
[Q. B. 133; APP. 162

3. —— *Gaming — Game of skill played for money — Suffering gaming on licensed premises—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94) *sect.* 17.] The respondent, a licensed person, suffered the game of "pool" to be played for small money stakes on a billiard table in the licensed premises:—*Held*, that the respondent had committed the offence of suffering gaming on the licensed premises under the Licensing Act, 1872, sect. 17. *Craig, Appellant*; *Boyan, Respondent* K. B. 429

4. —— *Interim transfer — Transfer by interim transferee*—18 & 19 *Vict. c.* 114, *sect.* 1.] An "interim" transferee of an excise licence is a person "duly licensed" within 18 & 19 Vict. c. 114, sect. 1; and an assignee of his interest in the licence is entitled to apply at the ensuing annual licensing sessions for a confirmation of such licence. *Reg.* (*Oates*) v. *Chairman and Justices of Co. Sligo* - - - - - Q. B. 352

5. —— *Notice of intended application for excise licence—Service of notice—"Next resident magistrate"—Residence*—3 & 4 *Wm.* 4, *c.* 68, *s.* 2.] Section 2 of 3 & 4 Wm. 4, c. 68, provides for service of a notice of intention to apply for an Excise licence upon the "two next resident magistrates":—*Held*, by the Queen's Bench Division, on *certiorari*, that it was not a sufficient compliance with the section to serve a magistrate who had a place of business nearer to, but who dwelt—"eat, drank, and slept, with his family"—further away from the applicant's premises than other magistrates:—*Held* on appeal (reversing the decision of the Queen's Bench Division), that a place of business where a magistrate ordinarily transacted his commercial business, and where he was to be found during the working hours of the day, was a residence within the meaning of the section. *Reg.* (*Gallagher*) v. *Chairman and Justices of Co. Tyrone* - - - Q. B. 497; APP. 502

LOCAL GOVERNMENT—District councillor —Acting while disqualified—Penalty 39
See PENALTY.
—— District councillor — Action against for penalties—Security for costs - 640
See SECURITY FOR COSTS. 1.
—— Existing officer—Compensation for loss of office - - - - 28, 367
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SOLICITOR.
—— Existing tenancy—Agreement for reversionary lease made before "appointed day"—Landlord to pay poor rate - 433
See POOR RATE.
—— Maintenance of roads—Contractor—Tender
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—— Malicious injury—Compensation
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MAINTENANCE OF ROADS — Local Government—Contractor—Tender 355
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MALICE—Absence of—Seditious libel—Pleadings—51 & 52 Vict. c. 64, s. 6 569
See SEDITION.

MALICIOUS INJURY — *Compensation for — Jurisdiction of Recorder of Belfast — Damage not amounting to £5—Belfast Borough Act*, 1865 (28 & 29 *Vict. c.* clxxxiii. *s.* 35) — *Local Government (Ireland) Act* (61 & 62 *Vict. c.* 37, *ss.* 5, 21) — *Repeal of Special by General Act.*] The Belfast Local Act, 1865 (sect. 34), enacted that the provisions of the Grand Jury Act, 1836, relating to malicious injuries (sects. 135–141) should not apply to that borough, and provided (sect. 35) that the Corporation should have jurisdiction to award compensation for the malicious injuries therein mentioned. The Belfast Local Act, 1868 (sect. 18), enlarged the class of cases in which the Corporation should have jurisdiction to grant compensation so as to include all cases in which any person should thereafter wantonly or maliciously destroy any dwelling-house, furniture, goods, &c., of any person within the borough:—*Held*, that the jurisdiction to award compensation possessed by the Corporation under these enactments was not transferred to the Recorder of Belfast by the Local Government Act, 1898 (sects. 5 and 21), and that the Recorder's jurisdiction to award compensation for malicious injuries was confined to such injuries as came within the purview of section 5 of the Local Government Act. *Mairs, Applicant; County Council of the County Borough of Belfast, Respondents* - - - - - - APP. 1

2.—— *Compensation for—Local Government (Ireland) Act* (61 & 62 *Vict. c.* 37 *ss.* 5, 21)—*County Borough of Dublin—Grand Jury Act*, 1836 (6 & 7 *Wm. 4 c.* 116)—7 *Wm. 4 & 5 Vict. c.* 2—*Injuries resulting from riotous and tumultuous assemblies*—4 & 5 *Vict. c.* 10—11 & 12 *Vict. c.* 69—16 & 17 *Vict. c.* 38—57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *sect.* 515—*Malicious injury done without riot or tumult—Jurisdiction.*] Section 5 of the Local Government (Ireland) Act, 1898, establishes a single code applicable to the whole of Ireland regulating the right to compensation for criminal injuries, and entrusts the administration of this code to the County Court. Therefore the Recorder of Dublin has jurisdiction to award compensation for any malicious injury falling within the definition of criminal injury as extended by that section, notwithstanding that there is no express repeal of the previous legislation by which compensation could be awarded for malicious injuries done in the city of Dublin only in cases where such injuries (not being burnings, etc.) were accompanied by riot or tumult. *Representative Church Body* v. *County Council of Dublin and Council of the County Borough of Dublin* KENNY, J. 255; APP. 261

MANDAMUS—Practice — Effective alternative remedy - - - - 133, 162
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MASTER AND SERVANT — Insurance against negligence of servant 262
See ARBITRATION.
—— Negligence of servant—Scope of employment
See LIABILITY OF EMPLOYER. [322
—— Payment of wages — Agreement concurred in by others in common employment—Truck Act - - - - 278, 305
See TRUCK ACT.
—— Workmemen's Compensation Act, 1897
See WORKMAN. 1–3 [241, 328, 633

MONEY PAID — *Promissory note — Principal—Surety — Discharge of debt.*] The plaintiff and defendant gave a bank their joint and several promissory note, the plaintiff being surety for the defendant. The plaintiff, when the note was overdue, gave the bank, in payment and discharge of the joint and several note, his own sole note, and was accepted as sole debtor. It was not shown that the defendant knew of or assented to this transaction. Afterwards the plaintiff executed to the bank a mortgage, charged on his property, which was of adequate value to secure repayment of the debt and interest. The note and mortgage were unpaid when the action was brought:—*Held*, by the Court, that in an action for money paid, the plaintiff was entitled to recover, and that, if necessary, the pleadings ought to be amended, though no amendment was asked for at the trial. *Per* Gibson, J., that the case was governed by *M'Kenna* v. *Harnett* (13 Ir. L. R. 206). *Per*

MONEY PAID—*continued.*
Kenny, J., that the case fell within *Fahey* v. *Frawley* (26 L. R. Ir. 78). *Gore* v. *Gore* Q.B. 269

MORTGAGE — *Collateral agreement — Once a mortgage always a mortgage—Clog on equity of redemption—Independent deed binding mortgagor to sell lands and give sale thereof to mortgagee, an auctioneer, and to pay a commission on the proceeds of sale, if sold by another.*] Where land has been mortgaged as a security for money, when the money is paid off the land, and its owner in the use of it, must be as free as if it had never been mortgaged, and provisions in the mortgage deed, or collateral thereto, inconsistent with this right, cannot be enforced. The defendant mortgaged his land to the plaintiff to secure a loan of £200 and interest thereon. The money was raised by the mortgagee by depositing the mortgage as security with a bank. As part of the same transaction the defendant agreed by an independent deed to sell his land within twelve months, and to give the sale thereof to the plaintiff, who was an auctioneer, and that if the said lands were sold otherwise than through the plaintiff he would pay the plaintiff five per cent. on the purchase money. The defendant subsequently sold the lands through another auctioneer for £1250 :—*Held*, by the Queen's Bench Division (Andrews, J., *diss.*), that the plaintiff was entitled to recover £62 10*s.* on the agreement. *Held*, by the Court of Appeal (reversing the decision of the Queen's Bench Division), that the collateral advantage stipulated for by the mortgagee in the independent deed placed such a fetter on the equity of redemption that it vitiated the agreement. *Browne* v. *Ryan* Q.B. 653; App. 671

2.——*Title-deeds—Equitable deposit—Contract—Injury to the deeds—Negligence—Right to damages pending redemption—Conveyancing Act*, 1881, *sect.* 16, *sub-sect.* 1.] *G.* deposited the title-deeds of his premises with the bank by way of equitable mortgage, to secure advances made to him from time to time. While so deposited, the deeds were greatly damaged by the flooding, on the occasion of an exceptional rain-fall, of the basement of the bank premises in which they were stored, and by reason of their injured condition, *G.* was obliged to abandon a contemplated sale of the premises. Without offering to redeem, *G.* commenced an action for damages against the bank for negligence in the care and custody of the deeds:—*Held*, that until redemption, *G.* had no right of action for damages against the bank. There is no implied covenant on the part of a mortgagee to take reasonable care of the title-deeds during the continuance of the security. The nature of an equitable mortgage by deposit of title-deeds considered. *Per* Barton, J., *Brown v. Sewell* (11 Ha. 49) and other cases, in which indemnity and compensation have

MORTGAGE—*continued.*
been decreed to mortgagors for loss of title-deeds by mortgagees, are not founded on the hypothesis of an implied covenant by the mortgagee to take care of the deeds, but are referable to the ancient jurisdiction of Courts of Equity to give relief in cases of accident. *Gilligan and Nugent* v. *National Bank, Limited* - - Q.B. 513

—— Assignment by one of several tenants in common of present tenancy of his share 61
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MOTION FOR JUDGMENT — Affidavit to resist — Step in action - - 267
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NEGLIGENCE — By equitable mortgagee — Title-deeds - - - - 513
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—— Of servant — Insurance against - 262
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—— Of servant — Liability of employer — Scope of employment - - - 322
See Liability of Employer.

NOTICE — Application for excise license — Next resident magistrate - 497, 502
See Licensing Acts. 5.

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—— —— XXIX., R. 1 - - - 267
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—— —— LXV., Rr. 3, 4, 7 - - - 350
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—— —— LXV., R. 4 - - - - 7
See Detinue.

—— 1898, December (Application of Enactments), Article 12, clause 11 - 39
See Penalty.

—— 1899, January 30 [Local Government (Procedure of Councils)], Article 18 - 355
See Roads.

OFFICE — Held during pleasure — Surgeon of county infirmary - - - 93
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—— Loss of—Deputy Cess Collector - 367
See Cess Collector.

—— Loss of — Solicitor acting occasionally for Township Commissioners - - 28
See Solicitor.

OFFICIAL ASSIGNEES — Vesting property of arranging debtor in — Proposal for arrangement, whether reasonable 51
See Arranging Debtor.

ORDER—Staying proceedings in Chancery Action—Registration as judgment - 115
See LIBEL.

OVERHOLDING—*Practice—Civil bill—Ejectment for overholding — Transfer of matter to Superior Court*—37 & 38 *Vict. c.* 66.] A civil bill ejectment for overholding may be ordered to be brought up and tried in the Queen's Bench Division under 37 & 38 Vict. c. 66. The words "action of ejectment upon the title" in 40 & 41 Vict. c. 56, s. 54, include actions of ejectment for overholding. *Nolan* v. *Cullen* - Q. B. 628; [APP. 632

PARLIAMENT—*Franchise—Inhabitant householder—Payment of rates—Tender of part—Union charges—Poor-rate—Local Government* (*Ireland*) *Act*, 1898.] A voter on whom a demand note for "union charges" and "county at large charges," forming the rate struck in respect of the qualifying premises, tendered to the rate collector so much of the rate as was described as "union charges." The rate collector refused to accept the sum so tendered unless the voter also paid the portion representing the "county at large charges." The Revising Barrister was of opinion that the "union charges" represented "the poor-rate" mentioned in the Franchise Acts, and as the sum equivalent thereto had been tendered to the collector, he retained the voter's name on the list:—*Held* (by the Court of Appeal), that the rate could not be subdivided, and that, as the entire rate had not been paid, the voter was disqualified. *Per* Lord O'Brien, L.C.J.: Tender of the poor-rate refused by the collector is not sufficient to qualify for the franchise. The rate must be paid. *M'Daid* v. *Galbraith* - - - - - - APP. 490

PARTIES—Residence within same—Civil bill jurisdiction—Costs—Writ of summons.
See COSTS. 3. [350

PAYMENT—Wages—Truck Act - 278, 305
See TRUCK ACT.

PAYMENT INTO COURT—Traverse—Question of title - - - - 611
See PLEADING.

PENALTY—*Local Government—Disqualification—Right to prosecute—Common informer—Appropriation of penalty.*] Any member of the public may prosecute for penalties under Article 12, clause 11, of the Application of Enactments Order of December, 1898, for acting as a District Councillor when disqualified, and it is competent to the Justices, under sect. 22 (8) of the Petty Sessions Act, to award to the prosecutor a part of the penalty, not exceeding one-third. *Kenealy* v. *O'Keefe* - - - - - - Q. B. 39

—— Action for—District Councillor acting while disqualified—Security for costs - 640
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PENALTY—*continued.*

—— Company—Sale of unlabelled poison—Common informer - - - - 589
See POISON.

PLEADING—*General Order XXII., R.* 1—*Defence—Question of title—Payment into Court.*] In an action claiming damages for trespass and injury to a reversion the defendant, though claiming no interest in the premises, is not entitled to put in a defence both denying the plaintiff's title and paying money into Court. *Cosgrave* v. *National Telephone Co.* - - - K. B. 611

—— Libel—Innuendo—Finding of jury that words were libellous but not in sense imputed- - - - - - 465, 479
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—— Seditious libel—Justification—Absence of malice - - - - - - 569
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POISON—*Sale of Poisons* (*Ireland*) *Act*, 1870 (33 & 34 *Vict. c.* 26), *s.* 2—*Sale of a poison* (*not labelled as such*) *by a limited liability company—Common informer.*] The prohibition against the sale of poisons, as to which certain precautions are not observed, contained in the Sale of Poisons (Ireland) Act, 1870 (33 & 34 Vict. c. 26), s. 2, is general, and applies to bodies corporate as well as to individuals. A common informer is entitled to prosecute for non-compliance with the provisions of this section. *Lawler, Complainant; P. & H. Egan, Limited, Defendants* - - K. B. 589

POLICY OF INSURANCE—Against negligence of insurer's servants—Defence of action—Negligence in conducting 262
See ARBITRATION.

—— Estate duty—Premiums not paid by deceased
See ESTATE DUTY. 1. [67

POOR RATE—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *sects.* 52 *and* 54—*Taxes—Existing tenancy—Agreement for tenancy made before the "appointed day" to commence after such day—Validity of contract that landlord should pay poor-rate.*] The provision in sect. 52, sub-s. 2 of the Local Government (Ireland) Act, 1898, making void any contract entitling the occupier of a hereditament to deduct from his rent any part of the poor-rate does not apply to contracts to that effect contained in reversionary leases, or agreements for such leases, made before the "appointed day," though not coming into operation until after that day. By an agreement executed subsequently to the passing of the Local Government (Ireland) Act, 1898, but prior to the 1st of April, 1899 (the appointed day on which the provisions of the Act with respect to the incidence of poor-rate came into operation), the plaintiffs agreed to let to the defendants certain premises for a term of ten years from the 1st of May, 1899, "the landlord to pay

POOR RATE—*continued.*
all taxes except water rate, which is to be paid by the tenant." The water rate referred to was a personal charge:—*Held*, that on the principle of *Scovell* v. *Gardiner* (16 Ir. C. L. R. 318) the word "taxes" should be construed as including poor-rate, and that such construction was not affected by the fact that the agreement was entered into subsequently to the passing of the Local Government Act. *Held*, also (*dub.* Lord O'Brien, L.C.J., and Boyd, J.) that the agreement having been entered into prior to the "appointed day" the tenancy thereby created was an existing tenancy within the meaning of ss. 52 and 54 of the Act, and that a contract by the landlord to pay poor-rate was valid. *Haslett* v. *Sharman* - K. B. 433
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—— Arbitration—Application to stay action—19 & 20 Vict. c. 102, s. 14 - - 262
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—— Bankruptcy—Debtor's summons—Adjudication—Application to annul—Payment of petitioning creditor's debt - - 186
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—— Common informer—Penalty incurred by disqualified District Councillor - 39
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—— Common informer—Sale of Poisons Act, 1870, s. 2 - - - - - - - 589
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—— Costs—Probate action—Subpœna—Witnesses' expenses—Attendance of country solicitor in Dublin—Counterclaim—Caveat—Citations - - - - - - 645
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PROBATE—*Jurisdiction—English domicil—Irish assets.*] The Court of Probate in Ireland has jurisdiction to grant probate of the will of a testator whose assets were in Ireland, although his domicil was English. *Robinson* v. *Palmer* [K. B. (Prob.) 489
—— Foreign domicil of testator—Conversion of real estate—Power - - - 232
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PUBLIC HEALTH—41 & 42 Vict. c. 52, ss. 40, 41 - - - - - - 387
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QUO WARRANTO—*Office held during pleasure—Surgeon of county infirmary—5 & 6 Geo. 3 (Ir.), c. 20—61 & 62 Vict. c. 37, s. 15.*] The office of surgeon of a county infirmary, being held during pleasure, is not one in respect of which *quo warranto* lies. *Reg. (Jacob)* v. *Blaney* - Q.B. 93

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ROADS — *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*Local Government (Procedure of Councils) Order, 30th January*, 1899—*Maintenance of roads, &c.*] In regard to maintenance works (roads, &c,) the policy of the Local Government (Ireland) Act, 1898, is that, where possible, such works should be executed not directly by the local authority, or under the county surveyor, but by contract; and it is the duty of the local authority to open and duly consider all tenders received in respect of proposals formulated by them. It is incumbent on persons tendering for such maintenance-contracts to satisfy the local authority as to the sufficiency of the proposed guarantors, as required by Article 18 of the Local Government (Procedure of Councils) Order of 30th January, 1899, and of such guarantors' willingness to give the necessary security. *Reg. (O'Sullivan and Curtin)* v. *Rural District Council of Mallow* Q. B. 355

SALE OF GOODS—Guarantee - 189, 615
See GUARANTEE.

SCOPE OF EMPLOYMENT — Negligence of servant - - - - - - 322
See LIABILITY OF EMPLOYER.

SECURITY FOR COSTS—*Action for penalties for acting as a councillor while disqualified—Municipal Corporations (Ireland) Act*, 1840 (3 & 4 *Vict. c.* 108), *s.* 89—*Local Government (Ireland) Act*, 1898.] In an action, brought under the Local Government (Ireland) Act, 1898, and the Municipal Corporations (Ireland) Act, 1840, sect. 89 (thereunder adapted), to recover penalties for acting as a councillor while disqualified, it is within the discretion of the Court to decline to order security for the defendant's costs where the only ground suggested is the plaintiff's poverty. *Kenealy* v. *Keane* - - - Q. B. 640

2. —— *Foreign judgment—Plaintiff resident in America—Satisfactory affidavit of good defence—Judgment obtained without jurisdiction.*] The R. B. Iron Co., who carried on business in Massachusetts, had sold goods to the defendants, whose place of business was at Clondalkin, in the county

SECURITY FOR COSTS—*continued.*
of Dublin, to the amount, as claimed, of £1328. In January, 1900, the defendants sent the vendors a draft of 832 dollars, which the defendants stated had been accepted in accord and satisfaction of the claim. On the 23rd February, 1900, the R. B. Iron Co. assigned the debt to the plaintiff, who resided in New York, in consideration of one dollar. The next day the plaintiff issued a process against the defendants, which he served upon *C.*, the managing director of the defendants, who happened to be in New York. An application by *C.* to the Court in New York to set aside service of the process was refused; and the plaintiff obtained judgment in the Court in New York. The plaintiff subsequently brought the present action suing on the foreign judgment. On application by the defendants for security for costs, founded on an affidavit setting forth all the above facts:—*Held* (affirming the decision of Kenny, J.), that the defendants had shown a reasonable prospect of establishing a defence to the action, and that security for costs should be given. *Dennis* v. *The Leinster Paper Co. Limited* - K. B. 337; App. 344

3. —— *Step in the cause or matter—Gen. Ord. XXIX., Rule* 1.] A defendant who has filed affidavits in opposition to, and has appeared in Court to resist, a motion for final judgment, has not taken any step in the action within the meaning of General Order XXIX., Rule 1, and is not thereby precluded from applying for an order for security for costs. *Armstrong* v. *Armstrong* - Q. B. 267

SEDITION—*Information ex officio—Libel—Seditious libel—Pleading—Omission to use the word "seditious"—Plea of justification, under* 6 *&* 7 *Vict. c.* 96, *s.* 6—*Plea denying malice, under* 51 *&* 52 *Vict. c.* 64, *s.* 4.] An information exhibited for seditious libel is not bad because the words "seditious," "seditiously," are not expressly used, if it clearly appear on the face of the information that the publication was with seditious intent. To an information for seditious libel, it is not open to the defendant to plead justification under Lord Campbell's Act (6 & 7 Vict. c. 96, s. 6), nor fair comment and absence of malice, under 51 & 52 Vict. c. 64, s. 4. *Reg.* v. *M'Hugh* - Q. B. 569

SERVANT.
See Master and Servant.

SETTLED PROPERTY—Finance Act, 1894, sect. 5, sub-sect. 2 - - - 386
See Estate Duty. 2.

SOLICITOR—*Local Government* (*Ireland*) *Act*, 1898 (61 *&* 62 *Vict. c.* 37), *sects.* 109, 115, 119, —"*Office*"—*Existing officer*"—*Solicitor to former Township Commissioners.*] A practising solicitor, who, prior to 1898, had, as occasion arose, transacted legal business for the commissioners of a township, but had not been appointed by any resolution of that body, nor had been in receipt of any fixed salary, is not an existing "officer" within the meaning of the Local Government (Ireland) Act, 1898, nor entitled to compensation for loss of "office" upon his services being discontinued by the Urban District Council created under that Act. *Reg.* (*Peel*) v. *Armagh Urban District Council* - - - - - Q. B. 28

—— Practising in country—Attendance as witness at trial in Dublin—Costs - - 645
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5 & 6 Geo. 3 (Ir.), c. 20—Public Infirmaries or Hospitals - - - - 93.
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27 Geo. 3 (Ir.), c. 35—Preservation of Game, s. 10 - - - - - 423
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3 & 4 Wm. 4, c. 68—Licensing, s. 2 497, 502
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6 & 7 Wm. 4, c. 116—Grand Juries 1, 255, 261
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7 Wm. 4 and 1 Vict. c. 8—Riotous and Tumultuous Assemblies - - 255, 261
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3 & 4 Vict. c. 108—Municipal Corporations, s. 89
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6 & 7 Vict. c. 96—Libel, s. 6 - - 569
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11 & 12 Vict. c. 69—County - - 255, 261
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18 & 19 Vict. c. 114—Licensing - - 352
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27 & 28 Vict. c. 67—Game - - 423
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—— Arbitration—19 & 20 Vict. c. 102, s. 14 262
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STEP IN ACTION — Resisting motion for final judgment - - - - - 267
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SUBDIVISION — *Landlord and tenant—Land Law (Ireland) Act, 1881, sections 2, 5—"Subdivision by the tenant" — "Conjunct tenant"—Effect of assignment (without notice to the landlord) of his divided share by one of two or more tenants in common of a present tenancy.*] Prior to 1881, *A*, *B*, and *C* were tenants from year to year of a farm of some 21 acres, each of them holding about 7 acres in severalty, and being severally rated in respect of their shares, and each contributing one-third of the rent, which was paid from time to time to one landlord in one sum, and receipts given in the joint names of the three tenants by the landlord, who was aware of the subdivision. In December, 1881, a fair rent was fixed on the farm by originating agreement and declaration entered into between the landlord and *A*, *B*, and *C*. In 1894 *C* mortgaged his 7 acres to the plaintiff, without notice to, or consent, of the landlord. *C* died, and the plaintiff brought a civil bill ejectment on the title, founded on his mortgage, against the defendants, *C*'s representatives. On case stated by the Judge of Assize:—*Held*, that the assignment of 1894 was not a "subdivision" of the holding within the 5th section of the Land Law (Ireland) Act, 1881. *Quære*—If a "subdivision" within section 5, would such an assignment by *C* be subdivision by "the tenant" within the meaning of that section? *Smyth* v. *Reid* - Q.B. 61

SUBPŒNA — Insertion of witnesses' names after sealing - - - - 645
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SUMMONS—Debtor's
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SURETIES FOR GOOD BEHAVIOUR — *Justices of the Peace—Inadmissibility of evidence—Rebutting complaint.*] On a complaint at Petty Sessions, requiring a person to find sureties for good behaviour, the same rule obtains as in applications requiring sureties to keep the peace, viz. that evidence is not admissible for the purpose of rebutting the evidence given in support of the complaint. This rule applies, although the summons alleges as its ground facts amounting to a charge of a criminal offence. *Halpin, Appellant; Rice, Respondent* - - K. B. 593

SURETY—Acceptance as sole debtor—Discharge of debts—Money paid - - 269
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TENANCY IN COMMON — Of present tenancy — Mortgage of a share — Subdivision - - - - - - 61
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TENDER—In part of poor rate—Inhabitant householder - - - - 490
See PARLIAMENT.

TITHE RENTCHARGE — *Fee-farm grant—Redemption of Rent Act*, 1891 — *Liability of tenant after fair rent fixed.*] The grantee or tenant under a fee-farm grant, after an order under the Redemption of Rent Act, 1891, fixing a fair rent upon his holding, still remains liable to tithe rentcharge. *In re Ruttledge's Estate* ([1895] I. R. 328) followed. *Irish Land Commission* v. *Magorian and others* - - - Q. B. 445

TITLE—Question of—Payment into Court and traverse - - - - - - 611
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TOWNSHIP COMMISSIONERS—Solicitor—Compensation for loss of office—Local Government Act, 1898, ss. 109, 115 119- - - - - - - 28
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TRADE NAME—Sale of bicycle - 189, 615
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TRANSFER OF CIVIL BILL ACTION—Overholding - - - - 628, 632
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TRANSFER—Of licenses—Assignee of interim transferee - - - - 352
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TRAVERSE—Coupled with payment into Court—Action involving question of title 611
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TRESPASS IN PURSUIT OF GAME—*Justices—Case stated—Evidence—Preservation of Game Act* (27 *Geo.* 3, *Ireland, c.* 35), *sect.* 10—27 *& 28 Vict. c.* 67—*Case Stated Act* (20 *& 21 Vict. c.* 43).] Upon the hearing of a complaint for unauthorized pursuit of game, it is not necessary in order to sustain a conviction to prove affirmatively that the defendant fired at any game, or had any game in his possession, if other evidence sufficiently lead to the inference that the offence was committed. *Per* Murphy and Boyd, JJ. Where Justices state on the face of a special case not only a conclusion of fact, but also the grounds of fact leading them to that conclusion, it is open to the Court to consider whether those grounds are sufficient in law to support their determination. *Per* Lord O'Brien, L.C.J. Where there is legal evidence to sustain a finding of fact by the Justices, such finding cannot be questioned on a case stated. *Tyrrell* v. *Flanagan* - - - - Q. B. 423

TRUCK ACT—50 *& 51 Vict. c.* 46—*Master and servant — Wages — Payment otherwise than in current coin of the realm—Agreement by workman to accept payment of portion of his wage in scrip of the company by whom he was employed—Agreement signed by those in common employment with the plaintiff.*] On a case stated upon the hearing of a civil bill appeal it appeared that the plaintiff was employed by defendants as a journeyman machinist at 22*s.* per week. The case stated erroneously that in October, 1894, the plaintiff signed an agreement, along with his fellow-workmen, to accept "a *reduction* of 10 per cent. on his wages—20*s.* a week in cash and 2*s.* to be applied to purchase shares of the defendant company." The plaintiff was paid 20*s.* down to the 24th April, 1897, when he served notice on the defendants that he would not accept the reduced wages, and from that date until February, 1899, he was paid 22*s.* a week in cash. In February, 1899, he left the defendants' employment, and brought an action for £12, the difference between the 20*s.* and 22*s.* a week from the date of the agreement in October, 1894, to the 24th April, 1897:—*Held*, by the Queen's Bench Division, who acted on the statement in the case, without seeing the agreement, which was supposed to be lost, that the contract entered into by the plaintiff was for a wage of 20*s.* and an addition of the purchase-money of scrip of the company at the rate of 2*s.*

TRUCK ACT—*continued.*
a-week, and that the case was not within the Truck Acts. *Held*, also, by the Queen's Bench Division, that even if the agreement were within the Truck Acts, the plaintiff, by its tripartite character, and the acquiescence of his fellow-workmen (some of whom were outside the Acts), and himself, was precluded from recovering. In the Court of Appeal the original agreement was produced, from which it appeared that the contract was made on the basis that the plaintiff's wages continue to be 22*s.*, of which 2*s.* per week was to be satisfied by shares:—*Held*, by the Court of Appeal, that the agreement was void under the Truck Acts, and the defendants were liable to pay so much of the plaintiff's wages as had not been paid in current coin of the realm; also that there was nothing either in the concurrence of the other workmen or in the plaintiff's own conduct to prevent him from recovering. *Glasgow* v. *Independent Printing Co.* - - Q. B. 278; App. 305

TRUST—For conversion — Will — Probate—Domicil - - - - - - 232
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UNREASONABLE DELAY — Railway Company—Wilful misconduct—Onus of proof - - - - - - 13
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UNREASONABLE PROPOSAL—Arranging debtor - - - - - - 51
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URBAN DISTRICT COUNCIL—Compensation for loss of office - - - 28
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—— Disqualification of Councillor — Penalty — Prosecutor - - - - - 39
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VALUATION ACTS—*Rates—Railway—Valuation—Re-valuation made without notice requiring a revision—Estoppel by conduct*—15 & 16 *Vict. c.* 63, *and* 17 *Vict. c.* 8, *ss.* 4, 5.] *Certiorari* lies to remove a revised valuation if made by the Commissioner of Valuation in excess of, or without, jurisdiction. Unless and until a revised valuation is got rid of, either on appeal or by *certiorari*, the rate must be struck according to such valuation. The County Council of Kerry having called for the revision of the portion of the Great Southern and Western Railway Company in the county of Kerry, the Commissioner of Valuation re-valued the entire line, and fixed a revised valuation, not only upon the portions in the county Kerry, but on the portions also that were situate in the other counties through which the line ran, including County Kildare. In the result, the valuation of the entire line was, as a whole, increased, but the valuation of the portion in the county of Kildare was diminished. The County Council of Kildare appealed to the Commissioner of Valuation for a re-hearing, but the Commissioner refused to alter his valuation. The Kildare County Council then appealed to the County Court Judge, but the notice of appeal did not state want of jurisdiction as a ground of appeal. The County Court Judge affirmed the valuation as to the main line, but varied it as to a branch line of the railway within the county. On application for a writ of *certiorari* to quash the revised valuation lists, and the order of Quarter Sessions, as being made without jurisdiction:— *Held*, by the Queen's Bench Division, that the revision of the portion of the railway in the county of Kildare, not having been made upon any application (under 17 Vict. c. 8, s. 4) by any ratepayer or collector in that county, was made without jurisdiction, that the order of Quarter Sessions must fall with it, and that the writ must go. *Held*, by the Court of Appeal, that (assuming the revision was without jurisdiction) the Kildare County Council were estopped by their conduct from raising the question, and that the order for a writ of *certiorari* should have been discharged. *Reg.* (*County Council of Kildare*) v. *Commissioner of Valuation, and Great Southern and Western Railway Company.* [Q.B. 215; App. 224

WAGES — Master and servant — Agreement signed by others in common employment
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—— "Existing tenancy"—61 & 62 Vict. c. 37, s, 52 - - - - - 433
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—— "Next resident magistrate"—3 & 4 Wm. 4, c. 68, s. 2 - - - 497, 502
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—— "Rent"—23 & 24 Vict. c 154, ss. 1, 51 416
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—— "Repair"—60 & 61 Vict. c. 3, s. 7, sub-s. 1 *See* WORKMAN. 2 - - - 328
—— "Scaffolding"—60 & 61 Vict. c. 37, s. 328 *See* WORKMAN. 2.
—— "Settled property"—57 & 58 Vict. c. 30 386 *See* ESTATE DUTY.
—— "Subdivision"—44 & 45 Vict. c. 49, s. 5 *See* SUBDIVISION.
—— "Taxes"—Agreement for lease - 433 *See* POOR RATE.
—— "Tenant"—44 & 45 Vict. c. 49, s. 5 61 *See* SUBDIVISION.
—— "Undertaker"—60 & 61 Vict. c. 37, s. 4 *See* WORKMAN. 3. [241

WORKMAN—*Master and servant—Workmen's Compensation Act*, 1897—*Death of workman as result of accident—Death of sole dependent before claim for compensation*—Actio personalis moritur cum persona.] The sole total dependent of a workman, who was killed by an accident arising out of his employment, died before she had filed or served a claim for compensation under the Workmen's Compensation Act, 1897. Had she lived, and taken the necessary steps to recover it, she would have been entitled to £150 compensation. The personal representative of the deceased workman subsequently took proceedings in the County Court to recover compensation, to be applied for the benefit of the dependent, and in payment of her debts:—*Held*, that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount. *In re O'Donovan and Cameron, Swan & Co.* - - - - - APP. 633

2. —— *Master and servant—Workmen's Compensation Act*, 1897, *s.* 7, *sub-s.* 1—*Painting and whitewashing—Repair—Scaffolding.*] The word "repair" in sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, may include painting, whitewashing, and dubbing the ceiling and walls of the interior of a building, where the painting and whitewashing is portion of the work necessary to finish the building. "Scaffolding" includes an internal staging arranged with planks resting on the step of a ladder and upon one of the roof principals, in the centre of a room. The plaintiff was engaged as a labourer at the Royal Barracks, Dublin, assisting in carrying out a contract made with the War Office for the periodic painting of portion of the building. The work consisted of painting, whitewashing, and plastering the old canteen block in the Royal Barracks, a building more than 30 feet high. The plaintiff, at the time of the accident, was engaged in dubbing the ceiling to prepare it for whitewashing. To give him access to the ceiling a ladder was placed leaning against one of the walls, and a plank resting on one of the rounds was thrown across the further end, resting upon one of the roof principals in the centre of the room, at such a height as to enable the man to work on the ceiling. The ladder slipped, and the plaintiff fell to the floor, and was injured:—*Held* (affirming the decision of the Recorder of Dublin), that the plaintiff was engaged in employment on a building which was being repaired by means of a scaffolding. *Wood* v. *Walsh* ([1899] 1 Q. B. 1009) dissented from. *Reddy* v. *Broderick* - - - APP. 328

3. —— *Master and servant—Workmen's Compensation Act*, 1897, *sects.* 4, 7—*Undertaker—Work merely ancillary or incidental to the trade or business of undertaker.*] A company, whose business was running cars for passenger traffic through the streets of Dublin on a tramway by electric power, employed a firm of contractors to erect coal-hauling machinery at one of their power-stations. Part of the coal-hauling machinery consisted of a trolley, at which *B.* was engaged at work. A splinter from the head of a bolt which he was driving into the trolley struck him in the eye, and destroyed the sight of the eye. *B.* was employed by the firm, and not by the company. At the time of the accident the firm had not handed over the coal-hauling machinery to the company, and none of the company's workmen were engaged upon it:—*Held*, that the erection of the coal-hauling machinery in the power-station was work merely ancillary to the company's trade or business, and that they were not liable to pay *B.* compensation under the Workmen's Compensation Act, 1897. *Brennan, Applicant*; *Dublin United Tramways Co., Respondents* - - - - - - - APP. 241

—— Wages—Truck Act - - 278, 305 *See* TRUCK ACT.

WORKMEN'S COMPENSATION ACT. *See* WORKMAN.

WRIT OF SUMMONS—Action in contract for less than £20—Parties resident within same—Civil bill jurisdiction—Indorsed claim for £1 5*s.* for costs - - 360 *See* COSTS.

THE END.

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